

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. 298

THE STATE OF TEXAS, APPELLANT,

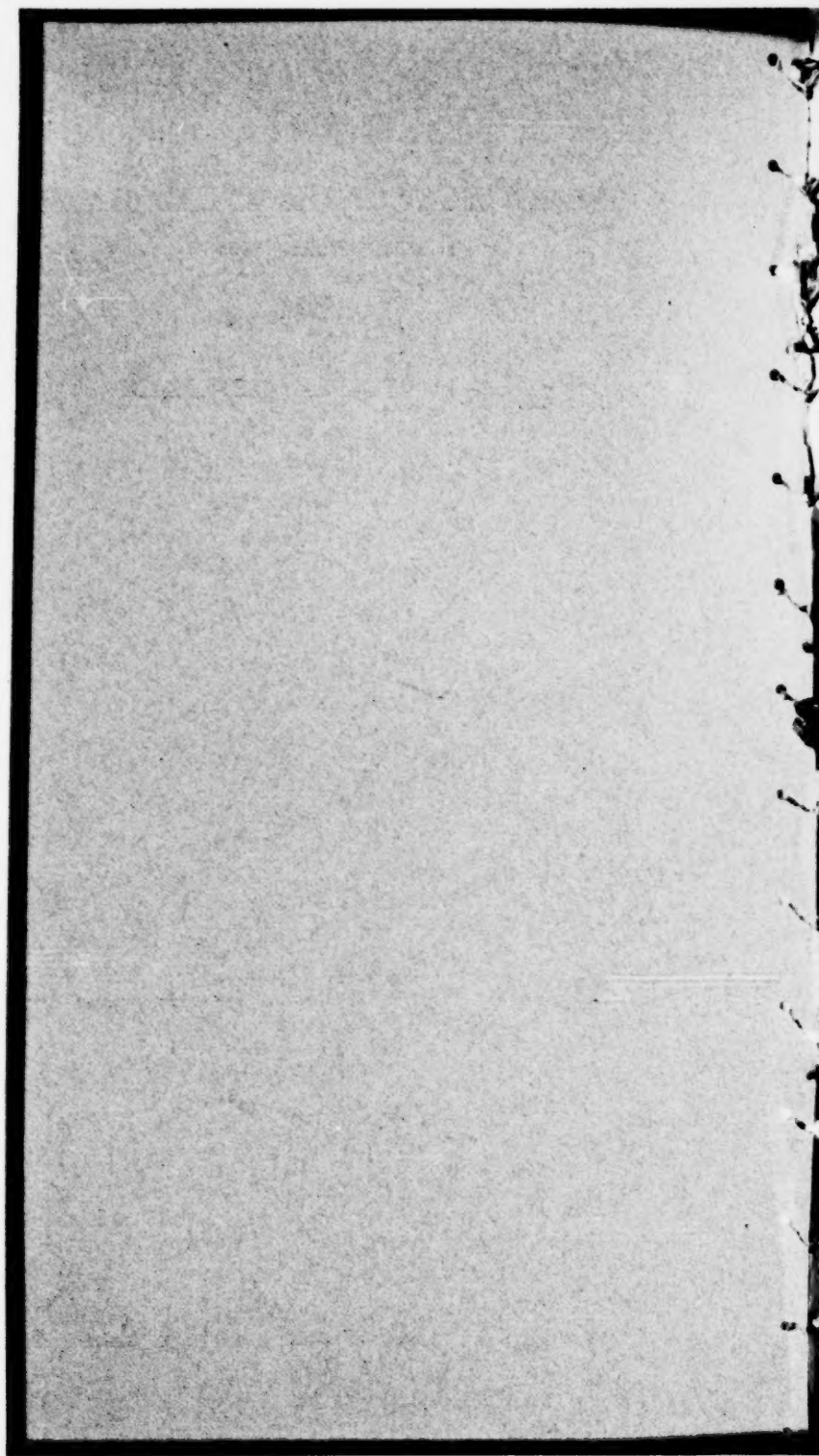
vs.

EASTERN TEXAS RAILROAD COMPANY ET AL.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TEXAS.**

FILED APRIL 13, 1921.

(28,227)



(28,227)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 870.

THE STATE OF TEXAS, APPELLANT,

vs.

EASTERN TEXAS RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print.
Caption	1	1
Plaintiff's original petition.....	2	1
Plaintiff's supplemental petition.....	9	8
Defendants' answer.....	34	20
Exhibit A—Application to abandon.....	45	28
Defendants' supplemental answer.....	57	33
Petition for removal.....	62	36
Bond for removal.....	70	41
Order of removal.....	72	43
Temporary injunction to Eastern Texas R. R. Company.....	73	43
Temporary injunction to E. B. Perkins.....	76	45
Temporary injunction to E. J. Mantooth.....	79	47
Defendants' motion to dissolve temporary injunction.....	82	50
Defendants' supplemental motion to dissolve temporary in- junction	86	52
Exhibit "A"—Certificate of convenience and necessity.....	88	52
Exhibit "B"—Certificate of convenience and necessity.....	96	58
Opinion of the court.....	99	60
Judgment	104	63
Petition for appeal.....	105	64
Assignments of error.....	107	65
Order allowing appeal.....	109	66
Citation on appeal.....	111	67
Stipulation or praecipe for transcript.....	112	68
Statement of evidence.....	115	70
Clerk's certificate.....	117	71

1 Supreme Court of the United States.

— Term, 192—.

No. —.

THE STATE OF TEXAS, Appellant,

vs.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN,
Daniel Upthegrove, and E. J. Mantooth, Appellees.

Appeal from the District Court of the United States for the Western
District of Texas, Austin Division.

— — — — —, Counsel for Appellant.

— — — — —, Counsel for Appellees.

Caption.

Be it remembered, that at a regular term of the United States District Court for the Western District of Texas, holding its session at Austin, Texas, and which term began on January 24th, A. D. 1921, and continued to and including the 17th day of March, A. D. 1921, there came on to be heard and determined before the Honorable Du Val West, United States District Judge, on March 17th, A. D. 1921, cause No. 323, Equity, entitled The State of Texas vs. Eastern Texas Railroad Company, et al., pending on the Equity Docket of said Court, and the application of the defendants therein to dissolve the injunction granted by the Honorable George Calhoun, Judge of the District Court of the Fifty Third Judicial District of Texas, at Austin, on the 9th day of July, A. D. 1920.

2 In the District Court of Travis County, Texas, for the Fifty-third Judicial District.

No. —.

THE STATE OF TEXAS, Plaintiff,

versus

EASTERN TEXAS RAILROAD COMPANY et al., Defendants.

To the Honorable George Calhoun, Judge of Said Court:

Comes now the State of Texas, plaintiff, acting by and thru the Attorney General of the State of Texas, and complaining of the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green,

Daniel Upthegrove, and E. J. Mantooth, defendants, for cause of action against the defendants, alleges to be true the following facts, viz:

1. Defendant Eastern Texas Railroad Company is a railroad corporation duly and legally incorporated and chartered under the laws of the State of Texas relating to the incorporation of common carriers by railroad for hire, and that E. J. Mantooth, who resides in the town of Lutkin, Angelina County, Texas, is the secretary of said railroad corporation and its agent upon whom service of process in this cause may be had. The defendant E. B. Perkins resides and has his domicile in the city of Dallas, Dallas County, Texas; the defendant Daniel Upthegrove resides and has his domicile in the city and county of St. Louis in the State of Missouri. The defendant E. J. Mantooth resides and has his domicile in the county of Angelina in the State of Texas, and the defendant F. W. Green resides and has his domicile in the county of — in the State of —.

2. By virtue of the terms of the general law enacted by the Twenty-first Legislature of the State of Texas and approved April 8, 1889, it was and is provided that no main track of any railroad once constructed and operated shall be abandoned or removed, and that said provision of said law has continuously remained in force and effect from its original enactment in the year 1889 to this date and is still in full force and effect.

3. On or about the 8th day of November, A. D. 1900, the promoters and organizers of what is now defendant, the Eastern Texas Railroad Company, filed in the office of the Secretary of State of the State of Texas the charter of said defendant Railroad Company, and that said defendant Railroad Company, acting under said charter and various amendments thereof, is and has continuously been since said date, to-wit: Nov. 8, 1900, a railroad corporation chartered, created and acting as such under and by virtue of its said charter and amendments thereof, and is in all things subject to the laws of the State of Texas. That attached to this petition, marked exhibit A and prayed to be taken as part hereof are certified copies of said charter of said defendant and of all amendments thereto.

4. That by the terms of said charter of said defendant Railroad Company, it applied to the State of Texas for authority and received from the State of Texas authority to construct a line of railway from the town of Lutkin in Angelina County Texas, thru said county and the counties of Trinity and Houston to the town of Kennard in Houston County, Texas, a distance of 30.3 miles, and that having received said authority, said defendant railroad company did thereafter by virtue of such authority actually construct said line of railroad, together with the appropriate and incidental sidings, spur tracks, depot buildings, switches and other structures, and is now maintaining and operating said line of railroad as a going concern, and is now and has continuously been for many years last past actually operating and maintaining said line of railroad as a common

carrier of freight and passengers for hire, and is and during all of said series of years has continuously been engaged in transporting over said line of railroad passengers and freight from points of origin to points of destination, each of which are wholly situated within the State of Texas, and that said line of railroad is together with all of its operating facilities and accessories wholly situated within the territory of the State of Texas, and that it in fact constitutes and is an important instrumentality for transporting and delivering passengers and freight in purely intrastate business in the State of Texas.

5. That by applying for and procuring the issuance to it of said charter from the State of Texas, and by the said amendments thereto, and by accepting and exercising the powers and authorities conferred upon it under the terms of said charter and its amendments, the defendant the Eastern Texas Railroad Company agreed to and contracted and obligated itself with the State of Texas that it would maintain and operate said line of railroad in conformity with all of the requirements and provisions of law existing and governing the operation and maintenance of railroads at the date when said charter was obtained, and that said defendant railroad company particularly contracted and obligated itself to the State of Texas that it would not during the time for which said charter was granted abandon or remove any portion of the main track of its said railroad after same was constructed, and that the above quoted provision of the general law of the Twenty-first Legislature of the State of Texas with reference to abandonment and removal of main tracks of railroads entered into and became a part of the contract existing between the State of Texas and said defendant railroad Company, and that by virtue of the terms of said contract said defendant railroad company became bound and obligated unto the State of Texas to continuously maintain and operate all of its main line of railroad from the date when said main line was constructed and placed in operation until the expiration of the contract evidenced by said charter and amendments thereto and laws entering into and becoming a part thereof.

6. That by virtue of the above quoted statutory provision of the act of the Twenty-first Legislature of the State of Texas with reference to the abandonment and removal of main tracks of railroads, the State of Texas in the exercise of its inherent, reserved and sovereign police powers made it unlawful for any railroad company doing business in the State of Texas to abandon or remove any of its main lines of railroad, especially main lines of railroad employed as said main line of said defendant's railroad is employed for the purposes of purely intrastate commerce of the State of Texas, and that said main line of said defendant's railroad cannot be removed or abandoned by said defendant without the consent of the State of Texas except by violation of its valid laws duly enacted in pursuance of its sovereign powers to prescribe police regulations governing the transaction of an instrumentality of its purely local commerce.

7. That by the terms of an act of the Congress of the United States denominated an act "for the regulation of transportation" passed Feb'y. 28, 1920, it is, in substance, provided that any railroad company engaged in interstate commerce that wishes to obtain authority to abandon any portion of its railroad and to cease operating same may apply for such authority to the Interstate Commerce Commission, and that said commission may upon hearing of such application grant to such railroad company the right to abandon and discontinue the operation of such line of railroad, the granting of which application shall be evidenced by a certificate of said commission. Said act further provides in express terms that "from and after the issuance of such certificate * * * the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate, and proceed with the * * * abandonment covered thereby."

Plaintiff alleges on information and belief that said quoted provision of said Federal transportation act, in so far as it attempts to bestow or confer upon railroad companies engaged in intrastate commerce the right or authority to abandon their instrumentalities of interstate commerce without the consent of the States in which such instrumentalities are exercised and in violation of the police regulations and contractual obligations existing between such carriers and such States, is unconstitutional and void because contrary to those constitutional provisions which prohibit the impairing of the obligations of contracts, and which reserve to the states all of their sovereign powers, except such as have been delegated by them to the Federal government, particularly their sovereign powers to regulate and preserve their instrumentalities of purely local commerce, and in this connection the State of Texas alleges that if said quoted provision of said transportation act is to be construed as attempting to confer on the interstate commerce commission power and authority to authorize the defendant the Eastern Texas Railroad Company to cease the operation of its said main line of railroad and to abandon same and to remove it, then said provision is unconstitutional, null and void because it constitutes an attempt by the Federal Congress to confer upon the Interstate Commerce Commission a power to exercise and prescribe police regulations in a matter which is reserved to and falls wholly within the jurisdiction and sovereignty of the State of Texas, and because it constitutes and is an attempt to confer authority upon the Interstate Commerce Commission to impair and destroy the obligations of said railroad company to the State of Texas and its people as fixed and evidenced by a valid and subsisting contract between the State of Texas and said defendant Railroad Company.

8. On or about the 3rd day of June, A. D. 1920, defendant the Eastern Texas Railroad Company filed with the Interstate Commerce Commission its certain written application for authority to abandon its said lines of railway situated in the counties of Trinity and Houston in the State of Texas, and for authority to take up and remove its

said tracks and for authority to sell and dispose of the salvage of said properties, and said defendant railroad company is proceeding to prosecute before the Interstate Commerce Commission its said application with a view to obtaining from said commission a certificate of the character attempted to be authorized by the terms of said act and described in paragraph 7 of this petition. The State of Texas alleges that said main track of said defendant railroad is a substantial and important instrumentality of purely intrastate commerce, having its points of origin and points of destination wholly within the State of Texas, and that if said defendant railroad company procures from the Interstate Commerce Commission said certificate which it is attempting to procure, it and the other defendants in this cause will in conformity with the purported authority attempted to be conferred by such certificate, immediately abandon the operation

6 of its said main track and will thereby immediately and irreparably damage the people of Texas who from day to day desire to use and do use said line of railroad as a common carrier for the transportation of passengers and freight in purely local as distinguished from interstate commerce. The plaintiff further alleges in this connection that said threatened and irreparable damage cannot be averted if the abandonment of said road is not enjoined and restrained prior to the action of the Interstate Commerce Commission on said application of said defendant railroad company, because said application will, if granted, purport to confer immediate authority on said defendant railroad company to at once abandon the operation of its said main line of railway, and that any abandonment thereof pending the action of this court on an application for injunction will, under the circumstances, work serious and irreparable damage to said travelling and shipping public. The State of Texas further alleges in this connection that it cannot safely submit itself to the jurisdiction of the Interstate Commerce Commission for the purpose of opposing the granting of said certificate to said defendant railroad company, because said transportation act attempts to prescribe a course of procedure for appealing from its decision which, if adopted by the State of Texas, would compel it to permit its citizens to suffer the irreparable damage above detailed pending the final disposition of such appeal, and would also compel it to invoke the jurisdiction of courts other than the courts of Texas for the protection of its sovereign rights. That a true copy of said application of said defendant railroad company to the Interstate Commerce Commission is attached to this petition, marked Exhibit B, and prayed to be taken as part hereof.

9. That the defendants herein, other than defendant the Eastern Texas Railroad Company, are each officers, agents, servants, employees and attorneys of said defendant railroad company, and are actively co-operating with it in its attempt to violate the laws of the State of Texas, and said contract with the State of Texas as above alleged, and are threatening to abandon and remove said main line of railroad tracks and cease the operation thereof.

10. The defendants herein, by the terms of their said application to the Interstate Commerce Commission, allege in substance that said line of said defendant railroad company cannot be operated except at a loss, and that such loss will continue from year to year in the future so long as said railroad is operated and maintained, and that the population along said line of railway is very sparse, and that there is no prospect of any increased commercial development in the territory tributary to said line of railway, and that the productive conditions in said territory are declining rather than improv-

7 ing. Said defendant railroad company further alleges in substance, as follows—that said line of railway is in bad physical condition and repair, and that it has no adequate rolling stock, and that said defendant cannot finance the operation of its said line of railroad and pay and defray its other fixed charges and expenses. The State of Texas alleges in this connection that it does not believe that said allegations of said application are true, but that it has not had opportunity to fully investigate or verify the truth or falsity of the allegations of said application. The State of Texas further alleges in this connection that if said allegations are true, and if said defendant railroad company cannot without financial loss presently operate said line of railroad, said facts do not afford any legal ground or justification for the violation of the valid laws of the State of Texas above set out or for the violation by said defendant of its said contract with the State of Texas, and that said defendant, because of said laws and because of its obligations under said contract with the State of Texas, and because of its paramount duty to the travelling and shipping public of Texas, is bound and obligated to maintain the operation of its said line of railroad even tho such operation may temporarily result in financial loss to said defendant. The plaintiff further alleges in this connection that if it be true that said defendant railroad company cannot presently finance the operation of its said line of railroad for any of the reasons alleged by it in said application, and if temporary conditions be such that the operation of said railroad can only be continued at financial loss to said defendant, then this Honorable Court should, for the protection of the rights of the State of Texas and of the shipping and travelling public, appoint a receiver for said railroad properties with authority and power to take possession of and operate said railroad properties, and with further power and authority to raise funds for said purpose by issuance of receivers' certificates which should be made a first lien against said properties and all receipts resulting from the operation thereof.

Premises considered, plaintiff prays that this Honorable Court forthwith issue and direct to be served upon each of the defendants a temporary writ of injunction enjoining and restraining each of them, and each of their agents, servants and employes until the further order of this Court from abandoning said line of railroad or any part thereof, and from ceasing or discontinuing the operation of said line of railroad, or any part thereof, for the transportation of passengers and freight in intrastate commerce. Plaintiff further

prays that this Honorable Court set this cause down for hearing on the above application for appointment of a receiver of the properties of the Eastern Texas Railroad Company, and that after due notice to the defendants, said Court, if necessary for the protection of the public, appoint a receiver of said property with the powers and duties above mentioned. Plaintiff further prays that upon final hearing hereof said temporary restraining order be made perpetual, and for all such other and further relief, either general or special, legal or equitable, as it may be entitled to by virtue of the premises.

C. M. CURETON,

Attorney General of the State of Texas.

BRUCE W. BRYANT,

Assistant Attorney General of the State of Texas.

V. L. BROOKS,

Of Counsel.

THE STATE OF TEXAS,

County of Travis:

I, Bruce W. Bryant, hereby on oath state that I am Assistant Attorney General of the State of Texas, and as such authorized to verify the foregoing petition. I further on oath state that the facts alleged in said petition are true, except where alleged on information and belief, and that where so alleged, I am informed and verily believe same to be true.

BRUCE W. BRYANT,

Subscribed and sworn to before me, the undersigned authority, by C. M. Cureton this 9th day of July, A. D. 1920.

VANCE STOCKTON,

Notary Public in and for Travis County, Texas.

(Endorsed:) No. 37,715. The State of Texas, Plaintiff, vs. Eastern Texas Railroad Company et al., Defendants. In the District Court of Travis County, Texas, for the Fifty-third Judicial District. Plaintiff's Original Petition. Filed in the District Court, Travis Co., Texas, 53rd Judicial District, July 9th, 1920. S. A. Philquist, Clerk.

9 In the District Court of the United States in and for the
Western District of Texas,

THE STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD COMPANY, a Corporation, et al., De-
fendants.

*Supplemental Bill of Complaint or Petition of the Plaintiff, The
State of Texas.*

C. M. Curston, Attorney General; W. A. Keeling, E. F. Smith,
Bruce W. Bryant, Tom L. Beauchamp, Assistant Attorney-Generals,
Solicitors for the Plaintiff, the State of Texas.

Filed January 15, 1921.

D. H. HART,

Clerk.

912 In the District Court of the United States in and for the
Western District of Texas.

THE STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD COMPANY, a Corporation, et al.,
Defendants.

*Supplemental Bill of Complaint or Petition of the Plaintiff, the
State of Texas.*

Now comes the complainant, the State of Texas, and presents this, its supplemental bill in answer to the original answer and supplemental answer of the defendants heretofore filed herein, and in answer to the defendants' motion to dissolve temporary writ of injunction granted herein, and in aid of the plaintiff's original petition heretofore filed in this cause. For such supplemental bill, the plaintiff alleges:

1.

For purposes of brevity, the allegations in this supplemental bill made against the "defendant" are intended to apply to the defendant Eastern Texas Railroad Company; and to the other defendants

10 in so far as they may have or may be aiding the said Eastern
Texas Railroad Company in the doing or the failure to do
those things set forth in this supplemental bill.

II.

(a) Plaintiff alleges that on the 8th day of November, A. D. 1900, defendant filed its Articles of Association in the office of the Secretary of State of the State of Texas, and thereby and thereafter became a corporation. That the name of the defendant under its said Articles was and is "Eastern Texas Railroad Company." That it was chartered "for the purpose of constructing, owning, maintaining and operating" a railroad from the town of Lufkin, in Angelina County, State of Texas, to the City of Crockett, in Houston County, Texas.

It was declared that the corporation should begin to exist on the 1st day of November, 1900, and continue as a corporation for a period of 25 years therefrom. The amount — defendant's capital stock as stated in its charter was \$150,000. The names and places of residence of the several persons forming the corporation were:

R. H. Keith, Kansas City, Missouri.
 W. C. Perry, Kansas City, Missouri.
 John Perry, Kansas City, Missouri.
 J. C. Sherwood, Kansas City, Missouri.
 Charles Campbell, Kansas City, Missouri.
 D. A. Nunn, Crockett, Texas.
 D. A. Nunn, Jr., Crockett, Texas.
 John Morrison, Texarkana, Texas.
 W. H. Carson, Texarkana, Texas.
 W. H. Welch, Texarkana, Texas.

The names of its first Board of Directors were:

W. H. Carson, Texarkana, Texas.
 W. H. Welch, Texarkana, Texas.
 D. A. Nunn, Crockett, Texas.
 11 D. A. Nunn, Jr., Crockett, Texas.
 R. H. Keith, Kansas City, Missouri.
 W. C. Perry, Kansas City, Missouri.
 J. C. Sherwood, Kansas City, Missouri.

The government of defendant in the management of its affairs was vested by its charter in the Board of Directors, President, Vice-president, Secretary and Treasurer, and a Superintendent or Manager. The capital stock of defendant was divided into 1,500 shares of the par value of \$100 each.

Afterwards on the 20th day of February, 1901, the defendant filed an amendment to its charter, naming the counties through which its proposed line should run. Afterwards, on or about the 26th day of August, 1902, the defendant amended its charter by increasing its capital stock from \$150,000, to \$1,000,000. Thereafter, on or about the 28th day of November, 1910, defendant again amended its charter and changed its general offices from the town of Kennard, to the City of Lufkin, in Angelina County. Defendant, by the act

of becoming a corporation under the Constitution and laws of Texas, and by the several amendments thereof to its charter, became a corporation chartered under the Constitution and laws of Texas, with the rights and privileges granted railroad corporations by the Constitution and laws of this State, and became charged with all the burdens and liabilities imposed by such Constitution and laws. That the charter of defendant and the several amendments thereof constitute an agreement and contract between the defendant and the

State of Texas for a period of 25 years from the 8th day of 12 November, 1900.

That the defendant did operate and maintain its line of railroad as constructed under the privileges and franchises received by it, in accordance with its said charter, and the Constitution and laws of the State of Texas; that it became bound and obligated to obey all Constitutional Statutes of the State of Texas and all lawful orders of the Railroad Commission of the State of Texas; that each and all of the statutes of this State of which it complains entered into and became a part of such charter contract and were then, and have since remained, and are now binding upon defendant.

That among other obligations which the defendant accepted when it became a corporation was that complained of by it, but nevertheless imposed by the statutes of this State, that it would not abandon take up and remove its main line of railway without the consent of the Legislature of the State of Texas, which it has not obtained; that it would likewise continue to operate its trains as provided for by the laws of Texas and obey the lawful orders of the Railroad Commission of the State of Texas; that by virtue of its said charter contract with the State of Texas, it obtained the right to be a railroad corporation and common carrier of passengers and freight for hire, with the right to charge fares, freights and tolls for its services; and to be protected in the exercise of these franchises and rights by the Constitution and laws of this State. That the defendant

13 by reason of its charter obtained the extraordinary right, privilege and franchise of eminent domain which it either did or could have exercised and which it may yet exercise should it find it necessary in carrying out its purposes as a chartered railway corporation under the Constitution and laws of this State. That the defendant, after having obtained its charter, proceeded to exercise the rights, privileges and franchises thereby granted it by the State of Texas and did construct its railroad and for a period of approximately 20 years has operated as a common carrier of freight and passengers for hire, and has collected large sums of money as a common carrier under and by virtue of the franchises, privileges and rights granted it by the Constitution and laws of Texas.

That among other privileges and rights acquired by defendant by virtue of its charter was that of receiving donations of right-of-way upon which its line of railway should be constructed; that defendant did receive large and valuable donations of right-of-way through Trinity and Houston Counties, the same being donated by the citizens of these respective counties

That by virtue of its said charter and franchises and privileges incident thereto, defendant obtained the privilege of serving a large territory with a large population and receiving tolls and charges incident to its business from this territory; that there were and are a number of cities, towns and villages of 200 population or

14 more within 20 miles of defendant's line, among which may be named Apple Springs, in Trinity County; Diball, in Angelina County; Alto, in Cherokee County; Crockett, in Houston County; and Wells, in Cherokee County; that the towns on defendant's line are Lufkin, in Angelina County, population 5,000; Chancey, in Angelina County, population of less than 100; Ratcliff, in Houston County, population of 900; Kennard, in Houston County, population of 1,200; that defendant was and is the only railroad at any of the four last named towns, except at Lufkin, but that at Lufkin there are five other railroads, to-wit:

The St. Louis Southwestern Railway Company; Angeline & Neches River Railroad; Groveton, Lufkin & Northern Railway, Texas Southeastern Railroad, and Houston East and West Texas Railway.

That, however, the defendant enjoyed the right of interchange of traffic with these last named railroads, guaranteed to it by the laws of Texas under its charter and franchise.

(b) That on or about August 28, 1906, defendant sold its net current assets amounting to \$24,604.49 and its rolling stock having a book value of \$70,000, to the Louisiana and Texas Lumber Company; that on September 1st, 1906, the St. Louis Southwestern Railway Company, a Missouri corporation, acquired the entire capital stock of defendant, and still owns the entire stock of plaintiff, except qualifying shares owned by its board of directors; that

15 since defendant's capital stock was so acquired by the said Missouri corporation, the defendant has ceased to have or exercise any will or purpose or management of its own, but all its activities as a common carrier have been merged with and become a part of the system of railways controlled by the St. Louis Southwestern Railway Company, a Missouri corporation, either directly or indirectly, through a subsidiary of the last named company, to-wit:

the St. Louis Southwestern Railway Company of Texas. J. M. Herbert is president of and a member of the board of directors of the St. Louis Southwestern Railway Company (of Missouri), of the St. Louis Southwestern Railway Company of Texas and of defendant. F. W. Green is vice-president and director of the St. Louis Southwestern Railway Company (of Missouri), and is also vice-president of the St. Louis Southwestern Railway Company of Texas, and of defendant. That G. K. Warren is Treasurer of the St. Louis Southwestern Railway Company (of Missouri), and Assistant Secretary and Treasurer of the St. Louis Southwestern Railway Company of Texas, and of defendant. That D. C. Dobbins is Superintendent of the St. Louis Southwestern Railway Company of Texas, and of defendant; and the auditing department of Eastern Texas Railway Company is done under arrangement by the auditing department

of the St. Louis Southwestern Railway Company of Texas;
16 that in routing passengers and shipping freight over the two Texas lines of the Missouri corporation, to-wit, the St. Louis Southwestern Railway Company of Texas and defendant, the rates, charges and fares, methods and management of transferring, treat the same as one and the same line; that to all practical intents and purposes, the Eastern Texas Railroad has been consolidated with and constitutes a part of the St. Louis Southwestern Railway
17 Company of Texas, which in turn is a part of the system owned and controlled by the St. Louis Southwestern Railway Company (of Missouri); that the St. Louis Southwestern Railway Company of Texas owns, controls and operates approximately 810.50 miles of railroad in Texas, including the mileage of defendant; that the St. Louis Southwestern Railway Company (of Missouri) owns, controls and operates approximately 1,753.83 miles of railway in the United States, including the 810.50 miles of railroad in Texas just referred to, that the mileage of defendant constitutes only an insignificant portion of the total mileage of the St. Louis Southwestern Railway Company of Texas, and a still smaller proportion of the total Southwestern Railway Company (of Missouri), and the revenues or losses derived from the operation of defendant constitute only an insignificant portion of the revenues or losses derived from or incurred by the St. Louis Southwestern Railway Company of Texas, or the system of railroads known as the St. Louis Southwestern Railway Company (of Missouri).

That during the period of the defendant's existence and down to and including the year 1917, the defendant was able to earn and receive, and did receive, a substantial corporate income in excess of its expenses, and that had such not corporate income been properly applied or expended, or any substantial amount thereof been
18 properly applied or expended in the upkeep of its line of road, said line of road would not require the unusual and extraordinary expenditures alleged and claimed to be necessary by the defendant in its bill.

Plaintiff alleges that since the acquisition of the stock of defendant by the St. Louis Southwestern Railway Company up to and about August 4, 1920, the defendant had only expended on additions and betterments of its line the approximate sum of \$3,793.40, and had expended in equipment the approximate sum of \$2,186.76, making a total expenditure for additions, betterments, equipments, of approximately \$5,980.16.

That if defendant has suffered any extraordinary decrease in its revenues since 1917 such decrease was due, as this plaintiff believes and alleges, to its management under Federal control, and to conditions brought about by the war, and to the fact that since the close of the war the country has been going through a period of reconstruction; that within a reasonable time and with the restoration of normal conditions, its revenues will, by the exercise of proper diligence on the part of defendant, again be sufficient to meet all its proper and necessary expenses; plaintiff further alleges that if defendant has suffered any extraordinary increase in its expenses, then such increase

was due to the war and conditions prevailing during the period of reconstruction; that with the return of normal conditions its expenses can be and will be materially reduced.

19 That the mere fact that defendant is not now operating at a profit, if in fact it is not so operating, which is not admitted, is not sufficient reason in law, either under the Fourteenth Amendment to the Constitution of the United States or under the Transportation Act of 1920, for permitting the defendant to abandon its railroad and remove the same, or to permit it to discontinue obedience to the laws of Texas requiring the operation of its trains under proper circumstances.

In this connection, plaintiff alleges that defendant has no bonded indebtedness of any kind or character, and is amply able to obtain sufficient funds from its own resources to carry forward its business as a common carrier; that by reason of its ownership by the St. Louis Southwestern Railway Company (of Missouri) and its consolidation with the St. Louis Southwestern Railway Company of Texas, the defendant can obtain sufficient funds to carry it over the present crisis in its financial affairs, if any such crisis exists which is not admitted.

That notwithstanding the fact that the stock of defendant has become the property of the St. Louis Southwestern Railway Company (of Missouri), and, notwithstanding the fact that it has become consolidated with the St. Louis Southwestern Railway Company of Texas, and has become a part of the system of railroads owned and controlled by the St. Louis Southwestern Railway Company (of

Missouri), still all the charter obligations and all statutory
20 obligations resting upon the defendant in the first instance are lasting and binding obligations on it, and, as to its operation, upon the lines with which it has been consolidated.

III.

Plaintiff alleges that the State of Texas is sovereign State of the Union, having been admitted into the United States on an equal footing with all the other States in all respects whatsoever, in 1845; that as such State it is within all the protective clauses of the Constitution of the United States, and has reserved to it all legislative, executive and judicial powers which were respectively reserved to the States at the time of the formation of the government of the United States and the adoption of its Constitution.

That among other rights so reserved to the several States of the Union and to the State of Texas, was that permitting them to create and control private corporations and particularly private corporations engaged in the business of common carriers; the property of which lies wholly within the State creating the corporations. That the government of the United States and the Congress, which is its agency for legislative matters, and the Interstate Commerce Commission, a legislative and administrative agency created by the Congress of the United States, have no judicial authority authorizing

21 them to determine any justiciable question where the political, property or contract rights of the State are involved; that justiciable controversies between the State of Texas and a sovereign state or the United States can only be determined under the Constitution of the United States, particularly under Article III, Section 2, and the Eleventh Amendment to the Constitution of the United States, in the Supreme Court of the United States; and cannot be determined before any other court nor before any legislative body or before Congress, nor before any legislative or administrative board or commission, nor before the Interstate Commerce Commission of the United States; that no citizen of the State of Texas and no citizen of any other State and no corporation of any kind or character can bring an action against the State of Texas, or against those lawfully acting for it as public officers, in any court, nor before the Interstate Commerce Commission of the United States, without the consent of the State of Texas; and that such consent has not been granted by the State of Texas for the defendant to sue it before the Interstate Commerce Commission of the United States.

That notwithstanding the aforesaid allegations of law and fact, the Congress of the United States did, by an Act approved February 28, 1920, generally known as the Transportation Act of 1920, pass an act, which in part reads as follows:

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some news-

paper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: Provided, that no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of \$100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(22) The authority of the Commission conferred by paragraph (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

25 That the substance and effect of these paragraphs of the Transportation Act is to authorize a carrier to bring an action before the Interstate Commerce Commission against the State and all other interested parties, for the purpose of obtaining a decree authorizing the complaining carrier to abandon all or any portion of its line of railroad, or the operation thereof; that said Act in effect provides for the service of a subpoena or notice on the public and on the State involved by delivery of a copy thereof to the Governor of the State with the right of such state to be heard; that said Act purports to give the Interstate Commerce Commission the right to hear such application and the pleadings and evidence of the parties, including that of the State, and to issue a decree granting to the complaining carrier the right to abandon all or any portion of its lines or railroad or the operation thereof. That said Act purports to confer authority upon the said Interstate Commerce Commission to grant such certificate of abandonment and the Railroad Company to carry into effect the terms of the same without securing the approval of the State or any of its agencies or authorities. That the legal effect of said Statute is to authorize the Interstate Commerce Commission to adjudicate:

(a) That such complaining railroad has complied completely as to time and effect with its charter contract with the State which chartered same.

(b) Or that the State has violated the terms of its charter
26 contract in such manner and form and under such circumstances as would authorize the carrier to no longer abide by and within the same;

(c) or that the financial condition of the road is such and all the facts and circumstances which surround it are such that it can not in law be required to comply with its charter contract with the State and the laws and regulations governing its operation;

(d) or that to further comply with its charter contract with the state and abide by the laws made for its regulation, would be to take the property of such carrier without due process of law;

(e) or that for the carrier to longer comply with such charter contract and the laws governing its existence and operation would be confiscatory and unreasonable;

(f) or that for the carrier to longer abide by its charter contract and the laws of the state governing its existence constitutes a burden on interstate commerce;

(g) or that other facts exist which authorize the corporation to abandon and take up its line of railroad or to abandon the operation of the same.

That each and all of the issues hereinabove suggested and which may be determined by the Interstate Commerce Commission and all such issues which it is contemplated may be determined by the In-

terstate Commerce Commission, whether here enumerated or not, are each and all judiciable issues between plaintiff and defendant in this case, or present questions for determination by the legislative department of the State.

Plaintiff alleges in this connection that the State of Texas has a complete system of laws for chartering, regulating and controlling railroads, beginning with its Constitution adopted in 1876, and continuing down to and including the various statutory enactments under the Constitution, including the creation of its State Railroad Commission for the purpose of controlling railroad corporations and administering the laws relative to them, down to the present time.

That the various statutes are too numerous to mention in this pleading, but are a part of the law of the land known judicially by this court. That the defendant obtained its charter, its right to be a corporation and all the franchises, rights, profits and emoluments incident thereto from the State of Texas, upon condition that it should accept as the law governing it the Constitution of the State of Texas and all the Constitutional statutes of Texas, and that it would abide by the —. Particularly was the defendant bound and obligated not to take up and remove its main line track without the consent of the Legislature of the State of Texas, and particularly was it bound and obligated to operate its line of railroad as a common carrier under the laws of the State of Texas, and the lawful orders of the Railroad Commission of Texas made for such purpose. That notwithstanding all the aforesaid, plaintiff alleges that on or about the 3rd day June, 1920, the defendant brought an action by filing an application or petition with the Interstate Commerce

Commission at Washington against the State of Texas and against the public in the manner and form contemplated by the aforesaid unconstitutional Act of Congress, for the purpose of having annulled by the said Interstate Commerce Commission its charter contract and all its obligations to the State of Texas and to the public so far as continuing its line of railway and the operation of its line was concerned, and for the purpose of securing the right to abandon its entire line of railway and the operation thereof; that there was then published a notice of such application on the part of plaintiff, as is required by this unconstitutional act, and the State of Texas summoned and cited in effect to appear before the Interstate Commerce Commission as a protestant or defendants by delivery to the Governor of the State a copy of such notice issued under the pretended authority of the Interstate Commerce Commission.

That the said Interstate Commerce Commission, assuming that said unconstitutional Act of Congress was law, proceeded to have testimony taken and a hearing on the subject matter of said complaint, but plaintiff did not appear or participate in said hearing or unlawful proceeding. That notwithstanding these facts, and notwithstanding the unconstitutional and void character of this pretended law, and notwithstanding that the State of Texas is protected

by the Eleventh Amendment to the Constitution and by the Fourteenth Amendment to the Constitution, which protects the contract alleged of the State of Texas with the defendant, still, nevertheless the Interstate Commerce Commission did, on the 2nd day of December, A. D. 1920, enter a judgment and decree which it denominates a "Certificate of Public Convenience and Necessity" in favor of the defendant, in which decree the said Interstate Commerce Commission found, in legal effect, that the State of Texas had been duly cited or subpoenaed, in that the said Commission in said certificate recited that "upon receipt of such application the Commission caused notice thereof to be given to and a copy to be filed with the Governor of the State of Texas"; that said Commission found and concluded in law that it had given "due notice to all parties in interest," and that it had given a hearing upon the application of the defendant "at which all parties in interest were given an opportunity to appear and be heard in the premises."

That in said decree or certificate referred to, the said Interstate Commerce Commission certifies that the present public convenience and necessity permit of the abandonment of all the lines of railroad of the Eastern Texas Railway Company, and it declares in said decree that, "it is therefore ordered that the Eastern Texas Railroad Company be and it is hereby authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle or remove any part or all of the property of said company; and in any lawful manner to dispose of any or all part of said property so taken up, dismantled or removed, or as it is now situated."

IV.

Plaintiff alleges that the Certificate of Public Convenience and Necessity ordered and decreed by the Interstate Commerce Commission and upon which the defendant relies was: (a) beyond the power which it could constitutionally exercise; (b) beyond its statutory power; (c) confiscatory of the contract rights of the State of Texas embraced within the charter of the defendant and the several statutes and the Constitution of the State of Texas which constituted a part of the same, and in violation of the 14th Amendment to the Constitution of the United States prohibiting the taking of property without due process of law; (d) that the granting of such Certificate was without evidence or without sufficient evidence in law to support the same, and was arbitrary and unjust; that the Commission in granting the same exercised its authority in such an unreasonable manner that the granting of the same was and is void; (e) that the granting of such Certificate was against the evidence before the Commission, and was and is contrary to the actual findings of fact made by the Commission itself, although said findings of fact themselves are more restrictive and more favorable to the defendant than the evidence itself warranted; that for all of said reasons, as well as all others alleged in this answer, the said Certificate of Public Convenience and Necessity is null and void.

V.

Plaintiff alleges that if it be found in truth and in fact that defendant is not able to operate the trains on its line of railway and to rehabilitate the same or if temporary conditions be such that defendant can only operate its railroad at a financial loss, then that for the protection of the rights of the State of Texas and the shipping and travelling public, this Court should appoint a receiver of said
31 railroad properties as is provided by the laws of Texas or as may be provided by the laws of the United States, if any applicable thereto, with authority and power to take possession of and operate said railroad properties and with further power and authority to raise funds for said purpose by the issuance of receiver's certificates which should be made a first lien against defendants' said property and all receipts resulting from the operation thereof.

VI.

The plaintiff further alleges that to dissolve the temporary injunction heretofore granted in this cause and to permit the plaintiff, the Eastern Texas Railroad Company, to discontinue the operation of its trains, abandon its road and remove its track during the pendency of this suit and before its final determination, would be to permit the destruction of the subject matter of the suit and that the final prosecution of this suit to a successful issue by the plaintiff would be vain and useless. That the only way to preserve the status quo so that the defendant, the Eastern Texas Railroad Company, would be able to respond to a judgment in favor of the plaintiff, is to maintain the status quo by a continuance of the temporary injunction heretofore granted. That the legal questions involved are *ones* of first impression arising over a very far reaching Act of Congress and one which vitally affects the control of plaintiff over the various railroad system within this State and acting under charters obtained under the
32 laws of Texas that and this court ought not to permit the distinction of the subject matter of this suit by authorizing the discontinuance of the operation of defendants' trains and the abandonment and the destruction of its railway until its constitutional right to do so has been determined by the Court's last resort having jurisdiction over the questions presented by plaintiff's bill and this supplemental bill.

VII.

The defendants have been cited in this cause and having appeared and answered the plaintiff reiterates its prayer contained in its original petition; it further prays that the motion to dissolve the temporary injunction heretofore granted be denied; and if necessary in accordance with plaintiff's allegations in its original petition and this supplemental bill that a receiver be appointed to operate said property; and upon a final hearing that the temporary injunction herein

be made perpetual and for all such further relief, either general or special, legal or equitable as plaintiff may be entitled to.

(Sgd.)

C. M. CURETON,
Attorney General;

W. A. KEELING,
E. F. SMITH,
TOM L. BEAUCHAMP,
BRUCE W. BRYANT,

*Assistant Attorney-General of the State of Texas,
Solicitors for the Plaintiff.*

33 THE STATE OF TEXAS,
County of Travis;

I, Bruce W. Bryant, hereby on oath state that I am Assistant Attorney General for the State of Texas and as such authorized to verify the foregoing supplemental petition. That the allegations made in the foregoing are made upon information and belief; that affiant believes the facts alleged to be true and upon such information and such belief alleges that the same are true.

(Signed)

BRUCE W. BRYANT.

Subscribed and sworn to before me the undersigned authority, on this the fourteenth day of January, A. D., 1921.

(Signed)

VANCE STOCKTON,

[SEAL.]

*Notary Public in and for
Travis County, Texas.*

34 In the District Court of the United States in and for
the Western District of Texas.

In Equity.

No. 323.

THE STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD COMPANY, INCORPORATED, a Corporation,
et al., Defendants.

Answer of Defendants.

Now come the Eastern Texas Railroad Company, Incorporated, a corporation, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, defendants in the above entitled action, and for answer to the petition and complaint of plaintiff herein, file the following:

1.

Defendants admit the allegations contained in Paragraph 1 of Plaintiff's Bill of Complaint, as alleged.

2.

Defendants specially deny the allegations contained in Paragraph 2 of Plaintiff's Bill of Complaint, and explaining the facts upon which plaintiff relies, defendants allege and plead that at the time the General Law enacted by the Twenty-first Legislature of the State of Texas, and approved April 8, 1889, referred to in said paragraph of said Bill of Complaint, was passed and approved, the Congress of the United States had not passed or adopted any law or laws particularly and definitely providing the method whereby a railway company, being a carrier engaged in interstate commerce, might abandon the operation of its line of railway, or any portion thereof, or the operation of trains and the carrying of freight and passengers thereon, and it is evident that the Legislature of the State of Texas and the State Government believed that they had the authority and power to pass the said Act approved April 8, 1889, the existence of which power defendants deny; and defendants further allege

35 that if the provisions of said Act, in which it is provided that no main track of any railroad once constructed and operated may be abandoned or removed, was ever valid and enforceable, then defendants say that such provision has not continuously remained in force and effect from its original enactment, in the year 1889, to the date of the filing of plaintiff's Bill of Complaint, because the Congress of the United States did pass the Act known as the "Transportation Act of 1920," which was approved February 28, 1920, whereby the said Act of the Legislature of the State of Texas, passed by the Twenty-first Legislature and approved April 8, 1889, was modified, superseded, repealed and ceased to have any force and effect, for the reasons that subdivisions (18) to (22) of Section 402 of said Transportation Act, conferred jurisdiction and power upon the Interstate Commerce Commission to authorize any carrier subject to the provisions of said Act to abandon its line of railway, or any portion thereof, and to abandon the operation thereof after application and hearing, and to issue a certificate that the present or future public convenience and necessity permit of such abandonment, and to attach to the issuance of such certificate such terms and conditions as in its judgment the public convenience and necessity may require; and said Act provides that after the issuance of such certificate any carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in and attached to the issuance of such certificate, and proceed with the abandonment covered thereby. That the defendant, the Eastern Texas Railroad Company is a carrier by railroad, subject to the provisions of said Transportation Act, and defendants aver that said Transportation Act and the provisions thereof with reference to the

abandonment of the operation of the line, or any portion of the line of a carrier by railroad is constitutional and authorized by the provisions of the Constitution of the United States, and that Defendant Eastern Texas Railroad Company has made application to the Interstate Commerce Commission to issue a certificate authorizing the abandonment of its entire line of railway and the operation thereof, as provided in said Act, all of which is hereinafter more fully explained and set forth.

3.

These defendants admit the allegations contained in Paragraph 3 of Plaintiff's Bill of Complaint, except that part which alleges that defendant Eastern Texas Railroad Company since filing its charter is in all things subject to the laws of the State of Texas, which allegation it denies and with reference thereto refers to and pleads the provisions of the Transportation Act of 1920, as referred to in paragraph 2 hereof.

4.

Defendants admit the allegations contained in Paragraph 4 of the Bill of Complaint, except that portion thereof which alleges that the Eastern Texas Railroad Company's lines "constitute and is an important instrumentality for transporting and delivering passengers and freight in purely intrastate business in the State of Texas," which it denies, and in reference thereto alleges that said Railway Company is engaged in transporting and delivering passengers and freight both intrastate and interstate business, and that such transportation is intermingled and carried together on practically every train operated by said railway company.

5.

Defendants specially deny the allegations contained in paragraph 5 of Plaintiff's Bill of Complaint, and with reference thereto allege that by accepting and exercising the power and authority conferred upon it under its Charter, that the Eastern Texas Railroad Company did not obligate itself, or contract with the State of Texas to maintain and operate said line of railway during the period of time for which said charter was granted, or that it would not remove said track, or any portion thereof, during said time, and that it did not and could not contract or agree with said State to waive, abandon or refuse to comply with or fail to comply with, when it was necessary, any provision of the Constitution of the United States, or the laws passed in accordance therewith, and that it did not contract or agree to operate said line of railway when the operation thereof would not pay operating expenses or when it was unable to procure funds with which to operate the same, or when the necessity for such operation ceased, and it here pleads and relies upon the provisions of said Transportation Act of 1920 referred to and plead in paragraph 2 hereof.

6.

These defendants specially deny the allegations contained in the Sixth paragraph of the Bill of Complaint, and in reference thereto allege that the Act of the Twenty-First Legislature of the State of Texas therein referred to is not an exercise of police power, but is an exercise of power affecting property rights, and that the same is subject to the powers conferred upon Congress by the Constitution of the United States and the power exercised by Congress in the passage of the Transportation Act of 1920 and the special provisions thereof referred to and plead in Paragraph 2 hereof to which reference is here again made.

7.

These defendants specially deny the allegations contained in the seventh paragraph of the Bill of Complaint, and in reference thereto plead, allege and aver that by virtue of the provisions contained in Section 8 of Article 1 of the Constitution of the United States,

wherein it is provided that Congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian Tribes," and "to establish post offices, and post roads" and "make all laws which will be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any Department or officer thereof," and by virtue of the other powers conferred upon the United States by said Constitution, the Congress of the United States was authorized and empowered to pass the Act known as the Transportation Act of 1920 with the provisions therein contained, and especially the provision contained in Subdivisions (18) to (22) added to Section 1 of the Act to Regulate Commerce, hereinbefore referred to;

Defendants allege that the line of railway of the Eastern Texas Railroad Company is an instrumentality of Commerce, and that the power to regulate commerce includes and embraces the power to regulate all instrumentalities used in commerce; and defendants further allege that the Eastern Texas Railroad Company was and is engaged in interstate commerce at the time of the passage of said Act, was chartered for the purpose of engaging in interstate Commerce, and is an instrumentality of interstate commerce, and has been since its organization, and that the power to regulate, control and authorize the abandonment provided for in said Transportation Act was by the Constitution of the United States vested in Congress, and was properly exercised by Congress in the provisions contained in the Transportation Act of 1920; that the same are valid and binding upon the State of Texas and the citizens of the State of Texas and the United States.

8.

Defendants admit the allegations contained in Paragraph 8 of the Bill of Complaint, wherein it is alleged that the Eastern Texas Rail-

road Company has filed with the Interstate Commerce Commission a certain written application for authority to abandon the operation of its lines of railway, and for authority to take up and remove its properties, and that said Company is proceeding to prosecute before the said Commission its said Application with a view of obtaining from said Commission a certificate, as provided for in said Transportation Act of 1920, and wherein it is alleged that said defendant Railway Company, if it procures said certificate, will, in conformity with the authority conferred thereby, abandon the operation of said line of railway, and will remove and dispose of its property constituting said line of railway; but defendants deny all and singular the other allegations in said paragraph contained, and in reference thereto plead and allege that said line of railway is not a substantial or important instrumentality of intrastate commerce, and that the abandonment of the operation of said line, or the removal of said tracks will not immediately and irreparably damage the people of Texas in any manner or form, but on the contrary these defendants say that said line of railway has ceased to be a necessary instrumentality in the transportation of commerce, either intrastate or interstate.

Defendants further allege that said line of railway was originally constructed for the real purpose and object of transporting manufactured products from a large saw mill and manufacturing plant established near Kennard on said line of railway, which saw mill and plant depended for its operation upon timber and logs that it could procure in the territory adjacent and contributory to said mill and plant, and that said timber has been cut out and manufactured and the products thereof shipped out, and said mill has been dismantled and removed, thereby depriving said railway company of all the freight and traffic to and from said mill and to and from the employes thereof; that since the occurrences aforesaid, the cutting out of said timber and the dismantling of said mill and plant, there is not sufficient traffic transported by said line of railway to pay its operating expenses or its maintenance or the necessary upkeep thereof, and that the defendant, the Eastern Texas Railroad Company has no method of procuring the necessary funds to conduct such operation, and that it is impossible for it to do so, all of which more fully appears from the statements and allegations contained in the Application which the said Railway Company has filed with the Interstate Commerce Commission, a copy of which is herewith filed, marked "Exhibit A" and made a part hereof, and the matters therein set forth are here adopted and plead as a part of this Answer as completely as if herein contained.

9.

Defendants specially deny the allegations contained in paragraph 9 of the plaintiff's bill of complaint, except the allegation that the defendants, other than the Eastern Texas Railroad Company, are each officials, employes and attorneys of said defendant railway company; and in reference to said paragraph 9, these defendants allege

that the defendant F. W. Green is vice-president of said Railroad Company and defendant E. J. Mantooth is General Attorney of said Railroad Company, and the defendants E. B. Perkins and Daniel Upthegrove are attorneys associated with said Mantooth and representing said railroad company as attorneys in making said Application to said Interstate Commerce Commission for the issuance of a certificate for said railway company, under the provisions of said Transportation Act of 1920; that the action of the personal defendants therein were in the capacity described and was not by way of cooperation in any attempt to violate the laws of the State of Texas, and was not and did not and does not constitute a threat to abandon and remove said main line of railway, track and property or cease the operation thereof, and defendants allege that the allegations contained in said paragraph 9, and none of the other allegations contained in said bill of complaint authorize the making of said Green, Mantooth, Perkins and Upthegrove defendants therein, and

41 that, therefore, there is a misjoinder of parties and said personal defendants should be dismissed from this cause.

10.

Defendants admit the allegations contained in Paragraph 10 of the Bill of Complaint as to the terms of the Application of the Eastern Texas Railroad Company to the Interstate Commerce Commission, but say that such allegations are not full and complete and do not adequately present the allegations contained in such application, and for a fuller statement thereof, here refer to Exhibit A which has theretofore been made a part of this Answer, for a correct statement of such allegations, and make the allegations contained in said Exhibit A a part hereof; but defendants deny all the other allegations in said paragraph 10 contained, except the allegations in reference to the necessity for the appointment of a receiver, and as to the allegations denied and the allegations with regard to the necessity for a receiver, by way of explanation defendants plead and aver; that the laws of Texas do not require a railroad company to operate its railroad where the public necessity therefor no longer requires such operation, and do not require a railroad company to operate its road at a financial loss where the receipts from such operation are insufficient to pay operating expenses, including maintenance and necessary betterments, and where there is no present prospect of reasonable increase in such receipts. Defendants further allege that the Eastern Texas Railroad Company has never entered into any contract, express or implied, with the State of Texas or with the traveling and shipping public of said state, and had never bound or obligated itself to maintain the operation of its line of railroad, where such operation would result in financial loss, and say that if

42 any obligation as claimed by plaintiff ever existed, which defendants deny, that the consideration therefor has wholly failed, by reason of the fact that the traveling and shipping public do not and have not furnished since the dismantling of the

saw mill and plant on the Eastern Texas Railroad lines a sufficient amount of traffic to pay the operating expenses and proper maintenance of said railroad, and there is no present or future prospect of such an amount of traffic being furnished.

As to whether or not a necessity exists for the appointment of a receiver by this Honorable Court, as set forth in said Paragraph 10, defendants say that said railway lines are now being operated under the compulsion of a temporary writ of injunction issued herein. As to how long this compulsory proceeding could or should be complied with, defendants are at present without knowledge, but will investigate and when sufficiently advised, will inform this court.

11.

Further answering, defendants allege that the Application to the Interstate Commerce Commission, copy of which *us* herewith filed, marked Exhibit A, was duly presented to said Commission, and notice thereof given in accordance with law, and a full and complete hearing had thereon, as required by law and the orders of said Commission, and said Commission took the same under advisement, but has made no order thereon and delivered no opinion therein up to the date of the filing of this Answer; and defendants show to the court that they confidently expect such order and opinion to be delivered prior to the Hearing hereof, and when the same is made, if made, these defendants will ask permission of this court to present the same to the court for its consideration.

12.

Further answering, defendants say that the defendant Eastern Texas Railroad Company has at all times, to the best of its ability, complied with the laws, state and federal, governing the

13 maintenance and operation of railroads, and has made every effort to economically operate and administer the properties of said company, that notwithstanding said facts said defendant railroad company had been unable to earn sufficient revenue from the operation of its lines of railway to pay operating expenses, including proper maintenance and betterments and the *paynebt* if taxes; that the operation of said lines is now being continued and performed at a loss, whereby a deficit is continually resulting and increasing; that such loss is of such magnitude and amount, and such deficit is growing and increasing in amount from week to week and from month to month, so that it is inevitable that the assets, including the entire value of said railroad company, will be entirely absorbed thereby, if the same has not already been absorbed; that such operation of said property is at present being performed under the compulsory process of the temporary writ of injunction issued herein, and as defendants are advised, cannot be abandoned without the defendants being in contempt of such proceedings and of this court, and that said temporary writ of injunction was issued at the

instance of plaintiff without notice to the defendant and without hearing thereon; that by reason of the facts aforesaid, and the facts hereinbefore set out in this answer, the private property of the defendant Eastern Texas Railroad Company is being taken for public use, and the defendant Eastern Texas Railroad Company is being deprived of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and in violation of the provisions of the Constitution of the State of Texas; that said writ of injunction was granted and ordered to be issued by the Honorable George Calhoun, Judge of the Fifty-Third Judicial District Court of the State of Texas on the 9th day of July 1920 enjoining and restraining each of the defend-

ants herein, and each of their agents, servants and employees until the further order of court, from abandoning the main line of the Eastern Texas Railroad Company, or any portion thereof, and from ceasing and discontinuing the operation of said line of railway, or any part thereof, for the transportation of passengers and freight in intrastate commerce; that said injunction was issued at the instance of the plaintiff herein, representing and acting for the public, including all persons using the lines of said Eastern Texas Railroad Company as a common carrier; and defendants aver that such injunction was unauthorized, was improvidently issued, and was and is an unwarranted interference with the rights of said defendant railroad company in the lawful use of its property, and commands and compels the defendants herein to perform, or attempt to perform, acts not required by the laws of the State of Texas and the United States, and acts which the defendants fear are dangerous to persons and property, and these defendants respectfully submit to the court that they should not be required by judicial process, to perform the acts therein commanded and required; and defendants aver that the defendant Eastern Texas Railroad Company is entitled to be protected by a decree and order of this court to the peaceful and quiet possession and enjoyment of its said property, and the lawful use and disposition thereof.

Wherefore, premises considered, defendants pray that the writ of injunction heretofore issued be dissolved, and that a judgment and decree herein be entered in favor of defendants against the plaintiff on the cause of action declared upon in said Bill of Complaint quieting the defendant, the Eastern Texas Railroad Company in the possession of its property and in the use and disposition thereof, and the defendants recover of and from the plaintiff all costs in this behalf expended, and for such other and further relief as the defendants, or either of them, may be entitled to in the premises.

(Signed)

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,

Attorneys for Defendants

"EXHIBIT A."

Before the Interstate Commerce Commission.

No. —.

Application of the Eastern Texas Railroad Company to Abandon the Operation of its Lines of Railway Situated in the Counties of Trinity and Houston, in the State of Texas, and to Take Up and Remove its Tracks and to Sell and Dispose of the Salvage of said Properties.

E. B. Perkins,
1102 Great Southern Life Building,
Dallas, Texas;

Daniel Upthegrove,
1710 Railway Exchange Building,
St. Louis, Missouri.

E. J. Mantooth,
Lufkin, Texas,
Attorneys for Applicant.

Before the Interstate Commerce Commission.

No. —.

Application of the Eastern Texas Railroad Company to Abandon the Operation of its Lines of Railway, Situated in the Counties of Trinity and Houston, in the State of Texas, and to Take Up and Remove its Tracks and to Sell and Dispose of the Salvage of said Properties.

To the Honorable Interstate Commerce Commission:

Now comes the Eastern Texas Railroad Company and files this application to abandon the operation of its lines of railway and take up and remove the tracks, buildings, structures, etc., constituting the same, and respectfully shows to the Commission:

I.

Your applicant is a railroad company, duly and legally incorporated under the laws of the State of Texas, by virtue of articles of incorporation filed in the office of the Secretary of State of the State of Texas, on the 8th day of November, 1900, and amendments thereof filed at dates subsequent thereto; that its post office address is Lufkin, Texas, and J. M. Herbert, 1704 Railway Exchange Building, St. Louis, Mo., is president, and E. J. Mantooth, Lufkin, Texas, is secretary, and E. B. Perkins, 1102 Great

Southern Life Building, Dallas, Texas; Daniel Upthegrove, 1710 Railway Exchange Building, St. Louis, Mo., and E. J. Mantooth, Lufkin, Texas, are attorneys for applicant; that by said articles of incorporation your applicant was authorized to construct a line of railway from the town of Lufkin, in Angelina County, through said county and the counties of Trinity and Houston, to the town of Kennard, in Houston County, Texas, a distance of 30.3 miles. That under and by virtue of such authority your applicant has constructed, maintained and operated a main line of railway 30.3 miles in length, together with sidings, spur tracks, buildings, structures, etc., and is now the owner of the same, and in possession thereof, and is now and has been since the date of its incorporation engaged in interstate commerce.

II.

That the present and future public convenience and necessity permit of the abandonment of the operation of its said lines of railway and the removal of the tracks, buildings, structures and other property constituting the same, and in this connection applicant avers:

(a) That prior to the construction of the lines of railway now owned and operated by your applicant, the territory traversed thereby was sparsely populated, and the production of merchantable or other articles to be transported therefrom as then and theretofore produced were not sufficient to justify the construction, maintenance and operation of a line of railway through such territory; that such territory was then furnished railroad transportation facilities and served by the International & Great Northern Railroad on the one side and the Houston East & West Texas Railway lines and the St. Louis Southwestern Railway Company of Texas lines on the other side, so that there was no portion of said territory a greater distance from a railroad station than eighteen or twenty miles, and the commodities produced for transportation could be handled by the ordinary wagon haul to such stations; that the same was true in regard to commodities destined for consumption in said territory, which latter commodities could be and were so transported by wagon haul; that the soil of such territory was and is of a general character that is not adapted to extensive and profitable agricultural and stock-raising business or production, with the exception that some of the bottoms along the creeks and rivers were productive; that the territory contained a large amount of merchantable pine timber, the greater portion of which was such a distance from railway transportation that such timber and logs could not be wagon hauled to the railway lines, and the lumber cut therefrom could not be wagon hauled to railway lines in quantities and at an expense that the traffic would bear. Thereupon, and under the circumstances, the Texas & Louisiana Lumber Company and the Central Coal & Coke Company, and persons interested in said companies owning same, acquired title or control of a large portion of the merchantable pine timber in such territory and projected, financed and

had constructed lines of railway owned by your applicant, and organized and established your applicant as a railway company for the purpose of constructing, maintaining and operating said line of railway, thereby enabling said companies and the persons interested therein to construct, erect and build a large sawmill near the station of Kennard and Ratchiff, on said lines of railway, to cut, saw and manufacture such timber into merchantable lumber and other lumber products. That said lumber companies did so construct its mill with a large manufacturing capacity, and did build and construct the necessary buildings therefor, and for the accommodation and residence of its officers, agents and employees, and did build up a large sawmill industry, which continued from the date of the commencement of the operation thereof until about the year 1917.

50 during the period that said mill and plant was operated therefrom produced therefrom a large amount of lumber and other products for the market, and the same was transported over the lines of railway of your applicant, and your applicant received receipts therefrom, and from the other articles of commerce transported were sufficient to pay the expenses of operation, maintenance and necessary additions and betterments of said lines of railway. The same were maintained and operated in a safe condition; the reason of the fact that said lines of railway cross many streams, and rivers that drain said territory, there is a great deal of bridge trestles, culverts, and because of this, and because of climatic conditions, such as heavy rainfalls, overflows, excessive heat and conditions peculiar to the climate and the character of the soil, lines of railway are very expensive to maintain.

(b) That about the year 1917 the Lumber Companies operating said mill, having cut out all the merchantable pine timber timber to said mill, determined to remove, and did remove, the plant and sawmill therefrom, and the transportation of the products of said mill thereby necessarily ceased and your applicant no longer to any revenue from this source.

(c) That since the abandonment and removal of said mill and plant, your applicant derives no revenue from the operation of said road except a small amount derived from passenger service.

51 small amount derived from the transportation of freight, which latter consists of logs, lumber and timber, agricultural products, farm products, an occasional car of live stock and some miscellaneous shipments, and the total revenue derived from all transportation performed by your applicant is insufficient to pay the operating expenses, maintenance and necessary additions and betterments of said line of railway, and in the opinion of your applicant there is no system of rates or character of operation whereby such traffic could afford to pay the expenses thereof; said lines of railway are now, with the most economical management, being operated at a loss and deficit, and such loss and will continue from year to year in the future. That said deficit for the year 1918 amounted to the sum of \$21,210.44 and for the year 1919 amounted to the sum of \$49,362.64.

(d) That the population along said lines of railway is very sparse and so far as your applicant can learn, or is advised, there is no prospect of any increased development in said territory tributary to its lines of railway, but your applicant is advised and believes that the productive conditions of said territory are declining rather than improving.

III.

Your applicant further shows that it has had a careful estimate made, which shows the following:

(a) That its lines of railway are constructed of thirty-five
52 (35) pound steel, which is badly surfaced and line bent and said lines, by reason of the ties, roadbed and structures being in a badly deteriorated condition, are now in an unsafe condition for operation and that said lines cannot be put in a safe operating condition except by a large expenditure of money; that applicant has had a careful inspection made of its said lines and has had an estimate compiled showing the amounts necessary to expend for the years 1920 and 1921 for maintenance, additions and betterments, necessary to put its lines of railway in a safe condition for operation, which shows that such expenditures will amount to the sum of \$125,992.00 for the year 1920, and the sum of \$87,141.00 for the year 1921.

(b) That the operation of its lines of railway are now conducted as economically as can be attained and the expense thereof amounts to about \$8,000.00 per month, and will increase by reason of large items of deferred maintenance accruing under Federal control.

(c) That your applicant has no rolling stock except a combination coach and baggage car, and has no other property or assets except the property constituting its said lines of railway.

(d) That your applicant has no bonded indebtedness.

(e) That the outstanding capital stock of your applicant amounts
53 to four thousand five hundred and forty-five shares (4,545), of the par value of \$100.00 each, all of which is owned by the St. Louis Southwestern Railway Company, except ten shares held by the directors of your applicant; and your applicant is authorized by due and legal action of its stockholders and board of directors at a meeting of said stockholders and directors held at Lufkin, Texas, on the 2d day of June, 1920, to make this application.

Wherefore, premises considered, applicant prays that notice be issued, published and served as required by law, and that a hearing be granted your applicant and on final hearing hereof a certificate be issued by this Commission granting to your applicant permission and authority to abandon the operation of said lines of railway now owned and operated by this company and take up and remove the tracks thereof and dismantle and remove all of the structures from the right of way of this company, and dispose of the salvage of both

tracks and structures to the best interest of the stockholders of this company, and that in event any section or sections or part or parcels of said tracks, or any of said structures can be sold and disposed of as now situated to a better advantage to the stockholders of the company, that the same be sold or disposed of in that manner; and that this company be authorized to dispose of its right-of-way, depot grounds or any portion or parcels thereof to the best advantage of the stockholders of this company, and that any such sales may be made

54 at private or public sale for cash or for credit as may be deemed to be to the best advantage, such order to be made upon such terms and conditions as in the judgment of the Commission the public convenience and necessity may require and may be reasonably and justly imposed, and that such other and further orders be entered as your applicant may be entitled to in the premises.

Respectfully submitted,

EASTERN TEXAS RAILROAD COMPANY,
By F. W. GREEN,
Vice-President.

55 DISTRICT OF COLUMBIA,

City of Washington, ss:

Before me, the undersigned authority, on this day personally appeared F. W. Green, who, being by me duly sworn, on oath says that he is vice-president of the Eastern Texas Railroad Company, and that he is duly authorized by said company to make this application, and has read the above and foregoing application, and says that the facts stated therein are true and correct, except where stated upon information and belief, and where so stated, he believes the same to be true.

F. W. GREEN

Subscribed and sworn to before me this 3rd day of June, A. D. 1920.

RUDOLPH T. HARRELL,
Notary Public for the District of Columbia.

My commission expires June 7, 1921.

E. B. PERKINS,
1102 Great Southern Life Building,
Dallas, Texas;

DANIEL UPTHEGROVE,
1710 Railway Exchange Building,
St. Louis, Missouri;

E. J. MANTOOTH,
Lufkin, Texas.
Attorneys for Applicant.

56 Endorsed: No. 323. In Equity. The State of Texas, Plaintiff, v. Eastern Texas Railway Company, Inc., et al., Defendants. Defendants Answer. Filed November 15, 1920. D. H. Hart, Clerk U. S. District Court for Western District of Texas.

57 In the United States District Court in and for the Western District of Texas.

In Equity.

No. 323.

STATE OF TEXAS

VS.

EASTERN TEXAS RAILROAD COMPANY et al.

Supplemental Answer of Defendants.

Now comes the Eastern Texas Railroad Company, incorporated, E. B. Perkins, F. W. Green, Daniel Uptlegrove and E. J. Mantooth, defendants herein, and by leave of the court files this, their supplemental answer, and supplementing the allegations in their original answer filed herein the fifteenth day of November, 1920, file the following:

I.

Defendants show to the court that since the filing of their original answer herein, on the 15th day of November, 1920, the Interstate Commerce Commission have, in the matter of Application of the Eastern Texas Railroad Company for a Certificate of Convenience and Necessity, Finance Docket No. 4, under date of December 2, 1920, entered an order granting a Certificate of Convenience and Necessity authorizing the Eastern Texas Railroad Company to abandon its lines of railway between Lufkin, Texas and Kennard Texas, which order embraces a report of the Commission, Division 4, Commissioner Meyer, Daniels, Eastman and Potter, and a certificate and order based upon such report authorizing the defendant, Eastern Texas Railroad Company to abandon the operation of all of the lines of railway now owned and operated by it and to take up, dismantle and remove any part or all of the property of said Company and in any lawful manner to dispose of any and all parts of said property so taken up, dismantled or removed, or as it is now situated, upon the terms and conditions specified and set out in said order, copy of which report and order in herewith filed marked "Exhibit B" and made a part hereof.

58 That defendant Eastern Texas Railroad Company accepts the terms and conditions of said Certificate and Order, and is willing and anxious to comply therewith in accordance with the provisions thereof, but is embarrassed and restrained in the exercise

of the authority and right granted to it by said Certificate and order by reason of the fact that the State of Texas, plaintiff herein, did on the 9th day of July, 1920, present to the Honorable Geo. Calhoun, Judge of the 53d, Judicial District of Texas its petition and Bill of Complaint herein, and procured the said Calhoun to make and enter an order as follows, to-wit:

"Austin, Texas, July 9th, 1920.

In Chambers.

Plaintiff's application for a temporary injunction, upon presentation and inspection by the court, is hereby granted as prayed for, and it is accordingly directed that the Clerk of this Court issue a temporary writ of injunction enjoining and restraining each of the defendants, and each of their agents, servants and employes until the further order of this Court from abandoning the main line of the Eastern Texas Railroad, or any part thereof, and from ceasing or discontinuing the operation of said line of Railroad, or any part thereof, for the transportation of passengers and freight in intra-state commerce.

This order is made subject to the right of the defendants, or any of them, to appear in this cause at any reasonable time and move the dissolution of said injunction.

GEO. CALHOUN,
Judge 53d District Court of Texas."

and did procure the clerk of said court to issue a temporary writ of injunction in accordance with said order, and procured service thereof on each of the defendants herein, whereby they are in form restrained from exercising the right of complying with the Certificate and order so made by said Interstate Commerce Commission, as hereinbefore set forth, unless and until an order is made by this court dissolving and setting aside said temporary writ of injunction.

2.

The defendants are advised and believe, and allege the fact to be that said order for a temporary writ of injunction, and said writ of injunction issued thereon, were not and are not authorized and are of no force or effect, for the reasons set forth in defendants' original Answer filed herein, and for the further reasons that the petition and Bill of Complaint of plaintiff herein states no cause of action authorizing the making of such order or issuing such writ of injunction, and that the same were not authorized by the rules of law or equity; and for the further reason that said order and writ of injunction were made and issued in violation of the Constitution of the United States and the Acts of Congress set forth and referred to in Defendants' Original Answer filed herein.

Wherefore, defendants pray, as in their Original Answer, that said temporary writ of injunction be dissolved, and pray for such further orders and relief as they may be entitled to in the premises, and for costs of suit.

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,
W. B. HAMILTON,

Attorneys for Defendants.

Endorsed: In Equity. No. 323. State of Texas v. Eastern Texas Railroad Company et al. Defendants' Supplemental Answer, Filed December 18, 1920. D. H. Hart, Clerk, by A. B. Coffee, Deputy.

60 THE STATE OF TEXAS,
County of Bexar:

E. J. Mantooth, being duly sworn according to law, deposes and says: That he is one of the attorneys for the defendants in the above entitled cause and is General Attorney of the Eastern Texas Railroad Company, a corporation, whose principal office and place of business is in the Eastern District of Texas, and is authorized to verify the foregoing pleading. That the allegations made in the foregoing pleading are made upon information and belief, and affiant believes the facts alleged to be true, and upon such information and belief alleges that the same are true.

E. J. MANTOOTH.

Subscribed and sworn to before me this the 15th day of March, A. D. 1921.

[SEAL.]

D. H. HART,
Clerk U. S. District Court,
By T. H. THOMPSON,
Deputy.

61 Exhibit "B" referred to in the foregoing Supplemental Answer of Defendants, the Report of the Commission, Division 4, Finance Docket No. 4, and also a Certificate of Public Convenience and Necessity which appears in this record mentioned in the sixth paragraph of the stipulation herein.

Defendants' Petition for Removal.

Filed Oct. 4, 1920.

In the District Court of Travis County for the 53rd Judicial District.

No. —.

STATE OF TEXAS

VS.

EASTERN TEXAS RAILROAD COMPANY et al.

Defendants' Petition for Removal.

Petitioners, Eastern Texas Railroad Company, F. W. Green, E. B. Perkins, Daniel Upthegrove, and E. J. Mantooth, defendants in the above entitled cause, and being all the defendants therein, present this their petition for removal of this suit to the District Court of the United States for the Western District of Texas, Austin Division, held at the city of Austin in said State, and as ground therefor respectfully show:

1.

That the above cause is a suit of a civil nature in Equity, of which the district courts of the United States are given original jurisdiction, and that the matter or amount in dispute exceeds the sum of \$3,000.00, exclusive of interest and costs.

2.

That this suit arises under the Constitution and Laws of the United States as is manifest from Plaintiff's original petition filed herein and as is hereinafter more fully shown.

3.

Your petitioners show that they are each citizens of the United States; that the defendant Eastern Texas Railroad Company is a railway corporation organized under the laws of the State of Texas and has its domicile and principal place of business at Lufkin, Angelina County, Texas, and its line of railway extends through and into the counties of Angelina, Houston and Trinity, in the State of Texas, and in no other counties, and it has offices and agents in said counties and no other counties or places; that the defendant F.

63 W. Green is a resident and citizen of the City of St. Louis, State of Missouri; the defendant E. B. Perkins is a resident and citizen of the city and county of Dallas, State of Texas; that the defendant Daniel Upthegrove is a resident and citizen of the City of

St. Louis, Missouri; and the defendant E. J. Mantooth is a resident and citizen of the town of Lufkin, County of Angelina, State of Texas.

4.

That from and since the time of the completion of its line of railroad in the year 1902, the defendant Eastern Texas Railroad Company has been and is now engaged in interstate commerce as well as intrastate commerce, and in the hauling and transportation of freight and passengers from points on its line in Texas destined to points in the States of Arkansas, Louisiana and Oklahoma, and other States of the United States, and also in transporting and hauling passengers and freight from its connecting lines on shipments and journeys originating in such other states destined to points in Texas. That on February 28, 1920, the Congress of the United States passed an Act entitled "An Act to Provide for the Termination of Federal Control of Railroads and Systems of Transportation; To Provide for the Settlement of Disputes between Carriers and their employees; To Further Amend an Act entitled 'An Act to Regulate Commerce' approved February 4, 1887, as amended, and for other *other* purposes," which said Act was duly approved by the President of the United States, and became and now is a law of the United States of America. That subsections 18, 19 and 20, of Section 402, of said Act are as follows:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Acts shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice

shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section 65 may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000.00 or by imprisonment for not more than three years, or both."

6.

That the defendant, Eastern Texas Railroad Company, acting under the above mentioned Act of Congress of the United States on the 3rd day of June, 1920, filed its application with the Interstate Commerce Commission of the United States at Washington, D. C., for a certificate of public convenience and necessity praying that it be granted authority to abandon its said line of railway and the station thereon, and that said application is still pending before said Interstate Commerce Commission, and said Commission acting through its duly constituted officers and examiners has taken testimony in support of and against the said application, but said case has not been reached for final action before said Commission.

7.

That this suit is brought by the State of Texas against the said Eastern Texas Railroad Company, and the other defendants herein, who are officers and attorneys for said defendant railway company, to restrain and enjoin these defendants and each of them, their agents, servants and employees from abandoning said line of railroad or any part thereof, and from ceasing or discontinuing the operation of same, or any part thereof, and from ceasing or discontinuing the operation of said line of railroad or any

part thereof for the transportation of passengers and freight in intrastate commerce, and for the making of such injunctions perpetual. And in its petition the plaintiff, the State of Texas, alleges that the provisions of said Act to Congress hereinabove referred to and designated in plaintiff's petition herein as "said Federal Transportation Act" is unconstitutional and void in so far as it appears to bestow or confer upon railroad companies engaged in intrastate commerce the right or authority to abandon their instrumentalities of intrastate commerce without the consent of the states in which such instrumentalities are exercised because Plaintiff avers that said provisions and said Act of Congress are contrary to those constitutional provisions which prohibit the impairing of the obligations of contracts, and which reserve to the States all of their sovereign powers, except such as have been delegated by them to the Federal Government, and particularly their sovereign powers to regulate and preserve their instrumentalities of purely local commerce, and alleges "that if said quoted provision of said transportation act is to be construed as attempting to confer on the Interstate Commerce Commission power and authority to authorize the defendant the Eastern Texas Railroad Company to cease the operation of its said main line of railroad, and to abandon same and remove it, then said provision is unconstitutional, null and void, because it constitutes an attempt by the Federal Congress to confer upon the Interstate Commerce Commission the power to exercise and prescribe police regulations in a matter which is reserved to and falls wholly within the jurisdiction and sovereignty of the State of Texas, and because it constitutes and is an attempt to confer authority upon the Interstate Commerce Commission to impair and destroy the obligations of said Railroad Company to the State of Texas and its people as fixed and evidenced by a valid and subsisting contract between the State of Texas and said defendant Railroad company."

8.

That this action *arises* under the constitution and laws of the United States in that the constitutionality of said Act of Congress is directly raised by the Plaintiff in its petition herein, and the question of the force and effect of said Act of Congress and the power and authority of the Interstate Commerce Commission under said Act of Congress and the legal effect of the certificate of public convenience and necessity provided for in said Act of Congress and applied for in the application filed with it by said Eastern Texas Railroad Company are involved herein.

9.

Petitioners present a good and sufficient bond as provided by the statutes in such cases, that they will enter into the District Court of the United States for the Western District of Texas, Austin Division, within thirty days from the filing of this petition, a certified copy of the record in this suit, and for the payment of all costs which

may be awarded by said court if the said District Court of the Western District of Texas shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, petitioners pray that this court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said court as provided by law, and as in duty bound your petitioners will ever pray.

68 EASTERN TEXAS RAILROAD COMPANY,
By E. J. MANTOOTH,
E. W. GREEN,
DANIEL UPTHEGROVE,
E. J. MANTOOTH.

STATE OF TEXAS,
County of Dallas:

E. J. Mantooth, being duly sworn, according to law, says:

That he is Secretary of the Eastern Texas Railroad Company, a corporation, and is familiar with the facts set forth in the above petition for removal, and is authorized to make this affidavit for said Eastern Texas Railroad Company, and that he is also one of the defendants mentioned in said petition, and that he has read the foregoing petition and that the facts set forth therein are true.

E. J. MANTOOTH.

Sworn and subscribed to before me this the 2nd day of October, A. D. 1920.

[SEAL.]

E. LEVY,
Notary Public,
Dallas County, Texas.

STATE OF MISSOURI
City of St. Louis:

E. W. Green and Daniel Upthegrove, being each duly sworn according to law, severally depose and say:

I am one of the petitioners in the above written petition and have read said petition, and the allegations therein set forth are true.

E. W. GREEN,
DANIEL UPTHEGROVE

Sworn and subscribed to before me this the 9th day of September, A. D. 1920.

[SEAL.]

ELIZABETH MOREDOCK,
Notary Public,
City of St. Louis, Missouri.

STATE OF TEXAS,
County of Dallas:

E. B. Perkins, being duly sworn according to law, deposes and says:

I am one of the petitioners in the above written petition and have read said petition and the same is true.

E. B. PERKINS.

Sworn and subscribed to before me this the 25th day of September, A. D. 1920.

[SEAL.]

ISABELLE ABRIGHT,

Notary Public,
Dallas County, Tex.

(Endorsed:) No. 37715, State of Texas vs. Eastern Texas Railroad Company, et al. In the District Court of Travis County for the 53rd Judicial District. Defendants' petition for removal. Filed Oct. 4, 1920. S. A. Philquist, Clerk.

70 *Bond for Removal.*

Oct. 4, 1920.

In the District Court of Travis County, Texas, for the 53rd Judicial District.

No. —.

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY et al.

Order of Removal.

Bond for Removal.

Know all men by these presents: That we, Eastern Texas Railroad Company, a corporation with its principal office at Lufkin, Angelina County, Texas, E. B. Perkins of Dallas County, Texas, F. W. Green and Daniel Upthegrove of the city of St. Louis, State of Missouri, and E. J. Mantooth of Lufkin, Angelina County, Texas, as principal, and American Surety Company of New York, as Surety, are held and firmly bound unto the State of Texas, plaintiff in the above entitled cause, in the sum of One Thousand (\$1,000.00) Dollars lawful money of the United States of America, for the payment of which well and truly to be made we, and each of us bind ourselves, and each of us, our heirs, executors and administrators, jointly and severally by these presents.

That the conditions of this obligation are such that whereas, the said Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove, E. J. Mantooth, have applied by petition to the 53rd Judicial District Court of the State of Texas in and for the County of Travis for the removal of a certain cause therein pending, wherein the State of Texas is plaintiff and the said Eastern Texas

71 Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth are defendants, to the District Court of the United States for the Western District of Texas, Austin Division, for further proceedings, on the grounds in said petition set forth, and that all further proceedings in said action — the said 53rd Judicial District Court of Travis County, Texas, be stayed.

Now, therefore, If your petitioners, the said Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, shall enter in said District Court of the United States for the Western District of Texas, Austin Division, aforesaid within thirty days from the date of the filing of said petition, a certified copy of the record in such suit, and shall pay, or cause to be paid, all costs that may be awarded therein, by said District Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto then this obligation shall become void, otherwise it shall remain in full force and effect.

[SEAL] EASTERN TEXAS RAILROAD COMPANY,
By F. W. GREEN,
Vice-President,
DANIEL UPTHEGROVE,
E. B. PERKINS,
E. J. MANTOOTH,
Principal.

Attest:

[SEAL] E. J. MANTOOTH,
Secretary Eastern Texas Railroad Company.

Approved

GEO. CALHOUN,
District Judge 53rd Judicial District of Texas.

(Endorsed:) No. 37715. The State of Texas vs. Eastern Texas Railroad Company et al. Bond for Removal. Filed Oct. 4th, 1920
S. A. Philquist, clerk

72

Order of Removal.

Oct. 19, 1920.

37715.

STATE OF TEXAS

VS.

EASTERN TEXAS RAILROAD COMPANY et al.

Order of Removal.

This cause coming on for hearing upon petition and bond of the defendants herein for an order transferring this cause to the United States District Court for the Western District of Texas, at Austin, and it appearing to the Court that the defendants did on October 4, 1920 file their petition for such removal in due form of law, and that the defendants on the same day filed their bond duly conditioned, with good and sufficient sureties as provided by law, and that the defendants have given plaintiff due and legal notice thereof, and it appearing to the court that this is a proper cause for removal to said District Court of the United States:

Now, therefore, said petition and bond having been accepted, it is hereby ordered and adjudged that this cause be, and it hereby is removed to the United States District Court for the Western District of Texas, at Austin, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this the 19th day of October, A. D. 1920.

GEO. CALHOUN,

*Judge.*73 *Temporary Injunction to Eastern Texas Railroad Company.*

Issued July 9, 1920.

The State of Texas to the Eastern Texas Railroad Company, of which E. J. Mantooth is Secretary and Agent, Greeting:

Whereas, in a certain cause pending on the docket of the District Court of Travis County, within and for the 53rd Judicial District of Texas, being cause No. 37,715, wherein the State of Texas is plaintiff and the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth are defendants; in said cause the said plaintiff, by and through its Attorney General, the Honorable C. M. Cureton, has filed its petition asking for the granting of the Court's most gracious writ of injunction to enjoin and restrain the defendants, and each of them, their agents, servants and employes from abandoning the line of railway of the defendant the Eastern Texas Railroad Company, running in and through the counties of Trinity and Houston, or any part thereof, and from

ceasing or discontinuing the operation of said line of railroad, or any part thereof, for the transportation of passengers and freight in intrastate commerce; plaintiff alleges that on the 3rd day of June, 1920, defendant the Eastern Texas Railroad Company filed with the Interstate Commerce Commission its certain written application for authority to abandon its said lines of railway situated in the Counties of Trinity and Houston in the State of Texas, and for authority to

74 take up and remove its said tracks and for authority to sell and dispose of the salvage of said properties, and said defendant Railroad Company is proceeding to prosecute before the Interstate Commerce Commission its said application with a view to obtaining from said commission a certificate of the character attempted to be authorized by the terms of said act and described fully in plaintiff's original petition on file among the files in this office; plaintiff further alleges that said main track of said defendant railroad is a substantial and important instrumentality of purely intrastate commerce, having its points of origin and points of destination wholly within the State of Texas, and that if said defendant railroad company procures from the Interstate Commerce Commission said certificate which it is attempting to procure, it and the other defendant herein named, will in conformity with the purported authority attempted to be conferred by such certificate, immediately abandon the operation of its said main track and will thereby immediately and irreparably damage the people of Texas who from day to day desire to use and do use said line of railroad as a common carrier for the transportation of passengers and freight in purely local as distinguished from interstate commerce; the Honorable George Calhoun, Judge of said Court, upon presentation and consideration of said petition has entered thereon the following order, to-wit:

"In Chambers.

Austin, Texas, July 9th, 1920.

Plaintiff's application for a temporary injunction, upon presentation and inspection by the Court, is hereby granted as prayed for, and it is accordingly directed that the Clerk of this Court issue a temporary writ of injunction enjoining and restraining each of the defendants, and each of their agents, servants and employes until the further order of this Court from abandoning the main line of the Eastern Texas Railroad, or any part thereof, and from ceasing or discontinuing the operation of said line of Railroad, or any part thereof, for the transportation of passengers and freight in

75 intrastate commerce.

This order is made subject to the right of the defendants, or any of them to appear in this cause at any reasonable time and move the dissolution of said injunction.

GEO. CALHOUN,
Judge 53rd Judicial District of Texas."

These are therefore to enjoin and restrain, and you the said the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, and each of you, your agents, servants and employes, are hereby enjoined and restrained from abandoning the above mentioned main line of railway running through the counties of Trinity and Houston, or any part thereof, and from ceasing or discontinuing the operation of said line of railway, or any part thereof, for the transportation of passengers and freight in intrastate commerce; such order being made subject to the further orders of the Court herein made and entered, and subject to the right of the defendants, or any of them, to appear in this cause at any reasonable time and move the dissolution of said injunction.

Herein fail not to obey this writ under the pains and penalties prescribed by Law.

Given under my hand and seal of office, at Austin, Texas, this the 9th day of July, A. D. 1920.

S. A. PHILQUIST,

[SEAL.]

Clerk District Court, Travis County, Texas.

76 Came to hand on the 12th day of July, A. D. 1920, at 10 o'clock A. M., and executed on the 12th day of July A. D. 1920 at 2 o'clock P. M., by delivering to the within named, defendant the Eastern Texas Railroad Company, of which E. J. Mantooth is its Secretary and Agent, in person a true copy of this writ, at Lufkin, in Angelina County Texas.

W. L. EVANS,

Sheriff Angelina County Texas.

(Endorsement:) No. 37715. The State of Texas vs. Eastern Texas Railroad Company, et al. Temporary Injunction to Eastern Texas Railroad Company. Issued July 9, 1920. S. A. Philquist, Clerk. Filed Oct. 4, 1920. S. A. Philquist, Clerk.

Temporary Injunction to E. B. Perkins.

Issued July 9, 1920.

The State of Texas to the Eastern Texas Railroad Company, of which E. J. Mantooth is Secretary and Agent, Greeting:

Whereas, in a certain cause pending on the docket of the District Court of Travis County, within and for the 53rd Judicial District of Texas, being cause No. 37,715, wherein the State of Texas is plaintiff and the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth are defendants; in said cause the said plaintiff, by and through its Attorney General, the Honorable C. M. Cureton, has filed its petition asking for the granting of the Court's most gracious writ of injunction to enjoin

and restrain the defendants, and each of them, their agents,
77 servants and employes from abandoning the line of railway
of the defendant the Eastern Texas Railroad Company,
running in and through the counties of Trinity and Houston, or
any part thereof, and from ceasing or discontinuing the operation
of said line of railroad, or any part thereof, for the transportation of
passengers and freight in intrastate commerce; plaintiff alleges that
on the 3rd day of June, 1920, defendant the Eastern Texas Railroad
Company filed with the Interstate Commerce Commission its certain
written application for authority to abandon its said lines of railway
situated in the Counties of Trinity and Houston in the State of
Texas and for authority to take up and remove its said tracks and
for authority to sell and dispose of the salvage of said properties, and
said defendant Railroad Company is proceeding to prosecute before
the Interstate Commerce Commission its said application with a view
to obtaining from said commission a certificate of the character at-
tempted to be authorized by the terms of said act and described fully
in plaintiff's original petition on file among the files in this office;
plaintiff further alleges that said main track of said defendant
railroad is a substantial and important instrumentality of purely
intrastate commerce, having its points of origin and points of desti-
nation wholly within the State of Texas, and that if said defendant
railroad company procures from the Interstate Commerce Commis-
sion said certificate which it is attempting to procure, it and the
other defendant herein named, will in conformity with the pur-
ported authority attempted to be conferred by such certificate, imme-
diately abandon the operation of its said main track and will thereby
immediately and irreparably damage the people of Texas who from
day to day desire to use and do use said line of railroad as a common
carrier for the transportation of passengers and freight in purely
local as distinguished from interstate Commerce; the Honorable
George Calhoun, Judge of said Court, upon presentation and
78 consideration of said petition has entered thereon the follow-
ing order, to-wit:

"In Chambers,

Austin, Texas, July 9th, 1920.

Plaintiff's application for a temporary injunction, upon presenta-
tion and inspection by the Court, is hereby granted as prayed for,
and it is accordingly directed that the Clerk of this Court issue a
temporary writ of injunction enjoining and restraining each of the
defendants, and each of their agents, servants and employes until
the further order of this Court from abandoning the main line of the
Eastern Texas Railroad, or any part thereof, and from ceasing or
discontinuing the operation of said line of Railroad, or any part
thereof, for the transportation of passengers and freight in intra-
state commerce.

This order is made subject to the right of the defendants, or any of them, to appear in this cause at any reasonable time and move the dissolution of said injunction.

GEO. CALHOUN,

Judge 53rd Judicial District of Texas.

These are therefore to enjoin and restrain, and you the said the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, and each of you, your agents, servants and employes, are hereby enjoined and restrained from abandoning the above mentioned main line of railway running through the counties of Trinity and Houston, or any part thereof, and from ceasing or discontinuing the operation of said line of railway, or any part thereof, for the transportation of passengers and freight in intrastate commerce; such order being made subject to the further orders of the Court herein made and entered, and subject to the right of the defendants, or any of them, to appear in this cause at any reasonable time and move the dissolution of said injunction.

Herein fail not to obey this writ under the pains and penalties prescribed by Law.

Given under my hand and seal of office, at Austin, Texas, this the 9th day of July, A. D. 1920.

S. A. PHILQUIST,

[SEAL.] *Clerk District Court, Travis County, Texas.*

Sheriff's Return.

Came to hand July 12th, 1920, and executed July 13th, 1920, by delivering to E. B. Perkins in person a true copy of this writ at Dallas, Dallas County, Texas.

DAN HARSTON,

Sheriff Dallas County, Texas.

By JACK GORMAN,

Dep.

Fee \$1.25.

(Endorsed:) No. 37715. The State of Texas vs. Eastern Texas Railroad Company, et al. Temporary Injunction to E. B. Perkins. Issued July 9, 1920, S. A. Philquist, Clerk. Filed Oct. 4, 1920, S. A. Philquist, Clerk.

Temporary Injunction to E. J. Mantooth.

Issued July 9, 1920.

Temporary Injunction to E. J. Mantooth.

The State of Texas to E. J. Mantooth, Greeting:

Whereas, in a certain cause pending on the docket of the District Court of Travis County, within and for the 53rd Judicial District of Texas, being cause No. 37,715, wherein the State of Texas is

plaintiff and the Eastern Texas Railroad Company, E. B. Perkins,
F. W. Green, Daniel Upthegrove and E. J. Mantooth are
80 defendants; in said cause the said plaintiff, by and through
its Attorney General, the Honorable C. M. Cureton, has
filed its petition asking for the granting of the Court's most gracious
writ of injunction to enjoin and restrain the defendants, and each
of them, their agents, servants and employes from abandoning the
line of railway of the defendant the Eastern Texas Railroad Company,
running in and through the counties of Trinity and Houston, or any
part thereof, and from ceasing or discontinuing the operation of
said line of railroad, or any part thereof, for the transportation
of passengers and freight in intrastate commerce; plaintiff alleges
that on the 3rd day of June, 1920, defendant, the Eastern Texas
Railroad Company filed with the Interstate Commerce Commission its
certain written application for authority to abandon its said lines
of railway situated in the Counties of Trinity and Houston in the
State of Texas, and for authority to take up and remove its said
tracks and for authority to sell and dispose of the salvage of said
properties, and said defendant Railroad Company is proceeding to
prosecute before the Interstate Commerce Commission its said appli-
cation with a view to obtaining from said commission a certificate
of the character attempted to be authorized by the terms of said act and
described fully in plaintiff's original petition on file among the
files in this office; plaintiff further alleges that said main track of said
defendant railroad is a substantial and important instrumentality
of purely intrastate commerce, having its points of origin and points
of destination wholly within the State of Texas, and that if said
defendant railroad company procures from the Interstate Commerce
Commission said certificate which it is attempting to procure, it and
the other defendants herein named, will in conformity with the pur-
ported authority attempted to be conferred by such certificate, im-
mediately abandon the operation of its said main track and will
thereby immediately and irreparably damage the people of Texas
who from day to day desire to use and do use said line of railroad
as a common carrier for the transportation of passengers and
81 freight in purely local as distinguished from interstate com-
merce; the Honorable George Calhoun, Judge of said Court,
upon presentation and consideration of said petition has entered the
following order, to-wit:

"In Chambers,

Austin, Texas, July 9th, 1920.

Plaintiff's application for a temporary injunction, upon presenta-
tion and inspection by the Court, is hereby granted as prayed for
and it is accordingly directed that the Clerk of this Court issue
a temporary writ of injunction enjoining and restraining each
of the defendants, and each of their agents, servants and employes
until the further order of this Court from abandoning the main line
of the Eastern Texas Railroad, or any part thereof, and from ceasing
or discontinuing the operation of said line of Railroad, or any part

thereof, for the transportation of passengers and freight in intrastate commerce.

This order is made subject to the right of the defendants, or any of them, to appear in this cause at any reasonable time and move the dissolution of said injunction.

GEO. CALHOUN,

Judge 53rd Judicial District of Texas.

These are therefore to enjoin and restrain, and you the said the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, and each of you, your agents, servants and employes, are hereby enjoined and restrained from abandoning the above mentioned main line of railway running through the counties of Trinity and Houston, or any part thereof, and from ceasing or discontinuing the operation of said line of railway, or any part thereof, for the transportation of passengers and freight in intrastate commerce; such order being made subject to the further orders of the Court herein made and entered, and subject to the right of the defendants, or any of them to appear in this cause at any reasonable time and move the dissolution of said injunction.

Herein fail not to obey this writ under the pains and penalties prescribed by law.

Given under my hand and seal of office, at Austin, Texas, this the 9th day of July, A. D. 1920.

S. A. PHILQUIST,

Clerk District Court, Travis County, Texas.

Came to hand the 12th day of July A. D. 1920, at 10 o'clock A. M. and executed on the 12th day of July A. D. 1920, at 2 o'clock P. M., by delivering to E. J. Mantooth the within named Defendant, in person a true copy of this writ, at Lufkin, in Angelina County, Texas.

W. L. EVANS,

Sher. Angelina Co., Tex.

[Endorsed:] No. 37,715. The State of Texas vs. Eastern Texas Railroad Company et al. Temporary Injunction to E. J. Mantooth, issued July 9, 1920, S. A. Philquist, clerk. Filed Oct. 4, 1920. S. A. Philquist, clerk.

83 In the United States District Court in and for the Western
District of Texas.

In Equity.

No. 323.

STATE OF TEXAS

VS.

EASTERN TEXAS RAILROAD COMPANY et al.

Defendants' Motion to Dissolve Temporary Writ of Injunction.

Now come the defendants in the above entitled cause and move the court to dissolve and set aside the temporary injunction issued herein July 9, 1920 by the clerk of the Fifty-Third Judicial District Court in and for Travis County, State of Texas, upon the order of Judge Geo. Calhoun, Judge of said Court, for the following reasons, to-wit:

1.

For the reason that the petition and bill of complaint filed by plaintiff herein does not set up and allege any cause of action, either in law or in equity, authorizing the granting of a temporary writ of injunction, or the issuance of such writ.

2.

For the reason that the petition and bill of complaint filed by plaintiff herein shows on its face that the matters and things complained of therein, which it is alleged were wrongfully to be done by the defendants, were matters and things authorized to be done by the Constitution and laws of the United States, and were therefore lawful, and could not be lawfully restrained by writ of injunction from the District Court of the State of Texas nor by writ of injunction from this court.

3.

For the reason that the matters of fact pleaded and set forth in the Original Answer and in the Supplemental Answer of Defendants filed herein, in reply to, denial of, and in explanation of the allegations contained in the petition and bill of complaint of the plaintiff filed herein, show that the plaintiff had not at the time of the filing of said petition and bill of complaint any cause of action against the defendants herein, or either of them, which authorize the issuance of a temporary writ of injunction.

4.

For the reason that the Constitution of the United States authorizes Congress to regulate commerce between the states and foreign nations and the Indian Tribes, and authorizes Congress to pass all laws necessary to carry into effect the provisions of the Constitution, and the further fact that the Congress in the exercise of the powers thus conferred, enacted the Transportation Act of 1920, wherein they conferred upon the Interstate Commerce Commission full power and authority to issue the defendant, Eastern Texas Railroad Company, a Certificate of Public Convenience and Necessity, empowering and authorizing said Railroad Company to abandon the operation of its lines of railway, and take up and remove the tracks, structures and property constituting the same, and to make lawful disposition thereof, or to dispose of the same as situated, either in whole or in part; and the further fact that said Interstate Commerce Commission has, on the application of the defendants, Eastern Texas Railroad Company, made, under the provisions of said Transportation Act, an Application for such certificate, which application has been granted, and fully empowers the said Railroad Company to abandon the operation of the said railway lines and dispose of the property constituting the same in accordance therewith, and upon the terms and conditions therein provided, which terms and conditions are accepted by said Railroad Company, whereby and by all of which the paramount law of the United States makes such action lawful.

55

5.

For the reason that it is apparent upon the entire record herein that the temporary writ of injunction issued as aforesaid was issued and served without authority of law or the rules of equity.

Wherefore, defendants move the court to dissolve and set aside said injunction, and make such other orders and decrees herein as are authorized by the rules of law and equity in such proceedings, and for such other and further relief as the court may find the defendants entitled to, including recovery of their costs in this behalf expended.

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,
W. B. HAMILTON,

Attorneys for Defendants.

[Endorsed:] Equity No. 323. State of Texas vs. Eastern Texas Railroad Co. et al. Defendants' Motion to Dissolve Temporary Writ of Injunction. Filed December 18, 1920, D. H. Hart, Clerk. By A. B. Coffee, Deputy.

86 In the United States District Court for the Western District of Texas, Austin Division.

No. 323, Equity.

STATE OF TEXAS

VS.

EASTERN TEXAS RAILROAD COMPANY.

Now comes the defendants and by leave of Court file this their supplemental motion to dissolve the injunction issued herein on the — day of July, 1920, by George Calhoun, Judge of the 53rd Judicial District Court of Travis County, State of Texas, and assign the following additional reasons:

First: Said injunction restrains J. M. Herbert, F. W. Green, Daniel Upthegrove, E. B. Perkins and E. J. Mantooth, to the same force and effect that it does the Eastern Texas Railroad Company, and defendants show to the Court that said Herbert and Green are President and Vice-President of said Company, and said other three named parties are Attorneys in this cause and for said Company; that neither of them have done any act or made any threats to abandon the operation of the said railroad, or dismantle the same, except that as officers and attorneys they have proceeded in accordance with the Act of Congress known as the Transportation Act of 1920 by making application to the Interstate Commerce Commission for authority to abandon the operation of, and dismantle, the road, as is shown by the pleadings, and that such action is not such as should be restrained by this injunction.

Second. That defendants have, in good faith, proceeded in accordance with the provisions of the Transportation Act of 1920, and applied to the Interstate Commerce Commission, the tribunal designated by Congress, for authority to abandon the operation of said railroad, and to dismantle the same, and that said Interstate Commerce Commission have, pursuant to direction of Congress with reference to such application, giving the notices required, and having the hearing as required, and hearing the arguments re-

87 quired, and thereafter have made an order and issued a Certificate of Public Convenience and Necessity authorizing the Railroad Company to abandon the operation of its line, and dismantle and dispose of the structures and superstructures constituting the same, together with all property of the said Company, and have directed how and in what manner that the same should be disposed of; that defendants have complied with said order and are now ready to give notice to the shipping public, as required by said order, that they will within thirty days cease the operation thereof, and to thereafter carry out the provisions of said order, but they are restrained by the injunction herein from complying with the authority granted

by Congress, which defendants submit is not authorized under the Constitution and Laws of the United States.

Wherefore, defendants pray as in their original motion to dissolve, and in addition thereto pray that the injunction be dissolved as to said personal defendants for the reasons aforesaid, and that said personal defendants be dismissed therefrom; And further pray that said injunction be dissolved as to the defendant, the Eastern Texas Railroad Company, and for such other orders and decrees as the defendants, or either of them, may be entitled to in the premises under the entire record now before this Court.

E. B. PERKINS,

E. J. MANTOOTH,

DANIEL UPTHEGROVE,

Attorneys for Defendants,

Eastern Texas Railroad Company et al.

[Endorsed:] No. 323. United States District Court, Western District of Texas, Austin Division. State of Texas v. Eastern Texas Railroad Co. Defendants' Supplemental Motion to Dissolve the Injunction. Filed March 15, 1921. D. H. Hart, Clerk, by T. H. Thompson, Deputy.

88

EXHIBIT "A."

Interstate Commerce Commission,

Finance Docket, No. 4,

In the Matter of Application of the EASTERN TEXAS RAILROAD COMPANY for a Certificate of Convenience and Necessity.

Submitted Sept. 27, 1920; Decided Dec. 2, 1920.

Certificate of Convenience and Necessity Issued Authorizing the Eastern Texas Railroad Company to Abandon its Line of Railway Between Lufkin, Tex., and Kennard, Tex.

E. B. Perkins, Daniel Upthegrove, E. J. Mantoorth, and E. B. Stroud, Jr., for Eastern Texas Railroad Company.

V. L. Brooks, S. N. Townsend, J. R. Painter, I. D. Fairchild, and Clay Stone Briggs, for Protestants.

John C. Box, for Lufkin Chamber of Commerce and Angelina County, Texas.

Report of the Commission.

Division 4.

Commissioners Meyer, Daniels, Eastman, and Potter.

By Division 4:

The Eastern Texas Railroad Company, hereinafter called the Eastern Texas, by petition filed June 3, 1920, seeks a certificate of

convenience and necessity to permit it to abandon its line of railway in Angelina, Trinity and Houston Counties, Texas.

89 The Eastern Texas extends from Lufkin, Tex., in a westerly direction, 30.3 miles to Kennard, Tex., and has in addition to this main line track about 4 miles of switch yard, and passing tracks. At Lufkin, its tracks connect with those of the St. Louis Southwestern Railway Company of Texas, hereinafter called the Cotton Belt, the Houston, East & West Texas Railroad, the Groveton, Lufkin & Northern Railway, the Texas Southeastern Railroad, and the Angelina & Neches River Railroad. Applicant has no other railroad connections. It maintains a joint agency with the Cotton Belt at Lufkin, has agency stations at Rateliff, Tex., and Kennard, and has 6 sidetracks at other points where carload freight may be received or delivered. It owns 1 combination passenger mail and express car, but no other rolling stock. It rents 1 light locomotive from the Cotton Belt, and pays per diem, under the code rules, for foreign cars while on its line. The only regular service it maintains is 1 mixed freight and passenger train daily, except Sunday, between Lufkin and Kennard.

The Eastern Texas was incorporated November 8, 1900, under the general railroad incorporation laws of Texas, to construct a railroad from Lufkin to Crockett, Texas. Its line was constructed to Kennard in 1901 and 1902, and has been continuously operated since, though it has not been extended to Crockett. The company was promoted and financed by individuals interested in the Texas, Louisiana Lumber Company, hereinafter called the lumber company, which is a subsidiary of the Central Coal & Coke Company of Kansas City, Mo. A substantial amount of applicant's right of way was donated to it by the owners of the land. It never received a land grant from the State, nor exercised the right of eminent domain. It was originally authorized to issue \$150,000 capital stock, which amount was increased in 1902 to \$1,000,000. Shares of stock with a par value of \$154,500, but no bonds, have been issued. On

90 September 1, 1916, all outstanding stock of the Eastern Texas was acquired by the St. Louis Southwestern Railway Company, hereinafter called the Southwestern, which, except for the directors' qualifying shares, still holds it. There is substantial identity between the officers of the Eastern Texas and the Southwestern, and the two roads have twice endeavored to consolidate since the stock purchase by the latter. The Texas legislature has refused to authorize the consolidation unless the Eastern Texas would extend its line to Crockett.

Applicant's line was constructed primarily to serve the Lumber Company, which then owned 116,000 acres of pine-timber land near Kennard, and had constructed at Rateliff what is said to have been one of the largest mills in the south for the production of lumber and forest products. Applicant built numerous tram roads through his timber to connect with its main line. On August 28, 1906, it sold these tram tracks, its current assets and rolling stock, aggregating in book value \$94,604.49, to the lumber company. This sale was made in contemplation of the transfer of the Eastern Texas

stock to the Southwestern for bonds of that company stated to have been worth the par value of the stock and the fair value of the Eastern Texas as determined by the Railroad Commission of Texas.

The Ratcliff mill ceased operation about 1917, and its tram tracks, machinery and practically all of its buildings have since been moved to locations not on applicant's line.

Applicant contends that since the removal of the mill there is not, and within any reasonable time will not be, enough traffic offered to produce revenue sufficient to pay its operating expenses. It shows

91 that the county it serves is largely cut-over timber land, the soil poor, and the agricultural development very limited except in the vicinity of Ratcliff and Kennard. It points out that the area is sparsely settled, particularly between those two towns where it is estimated that some 600 people live; and that there are no other towns or villages along the line. Ratcliff is said to have a population of 900 and that of Kennard is estimated at 1,200. The timber from some 20,000 acres of land, along applicant's line, owned by the Southern Pine Lumber Company, is transported either by the Texas Southeastern Railroad or the Groveton, Lufkin & Northern Railway. Three small mills, installed after the abandonment of the Ratcliff mill on account of the then abnormally high prices of lumber and forest products, ceased operating with the decline in the lumber market and were closed at the time of the hearing. The lumber company now owns about 84,000 acres of land surrounding Ratcliff and Kennard on some of which the second growth of timber is said to be of marketable size, but it is not yet in condition to be profitably cut.

About 70 per cent of the traffic handled by the Eastern Texas in 1919 consisted of forest products. Agricultural products totaled less than 10 per cent, and the remaining 20 per cent was made up of mine products, animals, manufactured products, merchandise and other commodities. During each of the 4 years immediately preceding June 30, 1913, mine products, consisting chiefly of bituminous coal used at the Ratcliff mill, exceeded the products of agriculture and animals combined; but the coal tonnage decreased from 6,886 tons in 1913 to 36 tons in 1918, and no coal moved in 1919, nor during the first five months of 1920. The greatest volume of agricultural products moved since 1909 was the 6,592 tons carried

92 in 1914. This traffic has decreased to 2,072 tons in 1919, and 1,038 tons was moved in the first 5 months of 1920. The tonnage of forest products from 1909 to 1917 ranged from 41,312 tons in 1915 to 66,936 tons in 1917. Only 25,738 tons of this traffic moved in 1918, 11,966 tons in 1919, and 9,958 tons in the first 5 months of 1920. The total of all commodities moved has decreased from 78,177 tons in 1913, to 21,352 tons in 1919, and 12,969 tons in the first 5 months of 1920. Exhibits offered showed a detailed statement of the freight tonnage handled by applicant from 1909 to 1920.

The income of the Eastern Texas shows a corresponding shrinkage since 1912 except for the year 1917. Applicant's gross income

for the year ended June 30, 1920, was \$34,210 and its net income \$24,494.21. The corresponding figures for 1917 were \$17,336.95 and \$6,391.57. Its operating expenses exceeded its operating revenues by \$9,699.66 in 1918, by \$1,086.15 in 1919, and by \$24,207.10 in the first 5 months of 1920. The total deficit incurred in 1918 was \$20,128.46, in 1919 it was \$49,362.64, and in January and February of 1920 it was \$10,484.27. The Eastern Texas was under Federal control during 1918, 1919, and the first 2 months of 1920, and its net corporate income was \$2,942.36 in 1918 and \$5,041.74 in 1919. There was a deficit of \$2,033.19 for March, 1920, \$4,455.54 for April 1920, \$11,703.96 for May, 1920, and applicant estimated its total deficit for the year would be \$68,824.68, exclusive of large expenditures necessary for maintenance of way to place the road in safe operating condition. Applicant's general balance sheet shows a credit balance of \$32,393.68 on May 1, 1920.

Applicant states it will furnish bond in the sum of \$100,000 for the cancellation of all of its outstanding obligations, and that the Southwestern will guarantee said bond and advance to applicant sufficient funds to pay or secure the payment of wages, accrued taxes, claims, loans, bills payable, and all other lawful obligations outstanding at the date of abandonment, if abandonment is authorized.

93 whether the indebtedness or obligation is or is not audited and reflected in applicant's account, and whether the claim has been or may later be presented.

Rates to and from Lufkin apply to and from Ratcliff and Kennard on interstate traffic, which comprises approximately 75 per cent of applicant's total tonnage. The divisions between the Eastern Texas and the Cotton Belt are said to be on a more liberal basis than is ordinarily allowed individual short line connections, and applicant contends that it would be impossible to increase its rates or divisions in amount sufficient to make its revenues meet its operating expenses. Its operating ratio was 440 per cent under the rates in effect immediately prior to the increases authorized in Increased Rates, 1920, 58 I. C. C. 220.

The Eastern Texas was originally well laid out from an engineering standpoint, the roadbed being generally level and the grades and curves short. The maximum gradient is slightly more than 1 per cent and the sharpest curve is about 4 degrees. The line was laid with 35-pound steel rails, which are not badly worn, but are both line and surface bent to such an extent that it is said trains cannot safely be operated over them at a speed exceeding 12 or 15 miles an hour. Many streams run at right angles across the railroad's right of way and, in addition to numerous cuts and fills, there are

50 bridges and trestles with a combined length of 8,862 feet, which range in height from 5 to 25 feet. The roadbed, trestles and bridges have not been well maintained, but the ties are in fair condition. Six bridges and trestles, with a combined length of 2,282 feet, are in need of immediate renewal to insure safe operation and all of the others require heavy repairs. Embankments and fills have fallen away, particularly at the bridge and trestle approaches, to such an extent that the ties are not properly

supported. The slopes of cuts and ditches have fallen in, damaging the draining so that, in many places, tires are covered with dirt. Applicant estimates that if operation is continued it will be necessary within the next two years to expend \$146,000 to \$200,000 on roadways, bridges and trestles, due largely to deferred maintenance attendant on the operation of the line at a loss.

The people of the community served by the Eastern Texas object to the granting of the certificate. It is shown that in case of abandonment of the road the nearest railway stations would be Crockett on the International & Great Northern Railway, about 17 miles from Kennard and 20 miles from Ratcliff, and Wells, Tex., on the Cotton Belt, about 20 miles northeast of Ratcliff. The public highways in this territory are not well improved. A fair, graded, clay-and-sand road extends from Ratcliff through Kennard to Crockett, but this road becomes soft during the rainy season. Another road not as good extends from Ratcliff through Sullivan Ferry to Wells. A road from Sullivan Ferry to Lufkin parallels the railroad for approximately 9 miles. Other roads extend from the general territory served by applicant to Morrell, Tex., and Alto, Tex., on the Cotton Belt and to Groveton, Tex., on the Groveton, Lufkin & Northern Railway. Livestock produced in the vicinity of

95 Ratcliff and Kennard hitherto has been driven to Crockett on account of better transportation facilities at that point. If the abandonment is permitted, it will be necessary to dray cotton and forest products a considerable distance to stations, but probably no further than some of the cotton produced in Texas is now hauled. Objectors testified as to the general conditions of the territory and the prospects for further increases in tonnage, but made no definite showing that within any reasonable time there would be sufficient tonnage to pay the operating expenses of the road. To meet their objections, applicant has offered to sell its line to any local interests for \$50,000.

Upon consideration of the record we find that the present public convenience and necessity permit the abandonment of the applicant's line, and we further find that permission to abandon the line should be made subject to the right of persons interested in the community served to purchase the property at a figure not in excess of \$50,000. A certificate and order to that effect will be issued.

EXHIBIT "B."

Certificate of Public Convenience and Necessity.

At a Session of the Interstate Commerce Commission, Division 4,
Held at Its Office, in Washington, D. C., on the 2nd Day of December, A. D. 1920.

Finance Docket, No. 4.

In the Matter of Application of THE EASTERN TEXAS RAILROAD
COMPANY for a Certificate of Convenience and Necessity.

Application No. 1 Ab-1.

Be it known, that on the third day of June, 1920, the Eastern Texas Railroad Company, a carrier subject to the Interstate Commerce Act, filed with the Interstate Commerce Commission its application for a certificate of public convenience and necessity to abandon all of its lines of railway between Lufkin, Texas, and Kennard, Tex., situated in the Counties of Angelina, Trinity and Houston, in the State of Texas, pursuant to the provisions of paragraphs 18, 19, 20 and 21 of Section 1 of the Interstate Commerce Act:

That upon receipt of such application the Commission caused notice thereof to be given to and a copy to be filed with the Governor of the State of Texas and caused said notice to be published for three consecutive weeks in a newspaper of general circulation in each county in or through which said line of railroad is constructed and operates:

That after applicant had made due return to the questionnaire showing the facts and circumstances with respect to such proposed abandonment; and after due notice to all parties in interest, a hearing was held on said application on the 19th day of July, 1920, at Austin, Tex., and on the 26th day of July, 1920, at Ratcliff,

97 Tex., at which all parties in interest were given opportunity to appear and be heard in the premises:

That after said case was submitted, representations were made to the Commission by the Legislature of Texas by a joint resolution with respect to the jurisdiction of this Commission in these proceedings:

That on the 2nd day of December, 1920, the Commission, by Division 4, made and filed a report containing its findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof:

Now, therefore, upon the record in this proceeding,

The Interstate Commerce Commission hereby certifies, that the present public convenience and necessity permit of the abandonment of all of the lines of railroad of the Eastern Texas Railroad Company as follows, to wit:

Between Lufkin, Tex., and Kennard, Tex., through the counties of Angelina, Trinity and Houston, in the State of Texas;

It is therefore ordered, That the Eastern Texas Railroad Company be, and it is hereby authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle or remove any part or all of the property of said company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated.

Provided, however, That the Eastern Texas Railroad Company shall first offer all of the property now owned by it for sale, free of all encumbrances, for a sum not to exceed \$50,000 to any party or parties interested in the community served by said road on condition that the purchaser at such sale shall continue the operation of said lines of railroad;

Provided, further, That the Eastern Texas Railroad Company, be, and it is hereby, required to furnish to the Interstate Commerce Commission a good and sufficient bond secured by the St. Louis

Southwestern Railway Company in the penal sum of \$100,000, to be approved by the Secretary of the Interstate Commerce Commission, conditioned on the understanding that the said Eastern Texas Railroad Company will, before the expiration of one year after the date of this certificate, adjust, settle and pay all outstanding debts, obligations, judgments, liens, or mortgages, together with all taxes and assessments, Federal, state or municipal, due or to become due, and all claims or judgments for damages to persons or property.

Provided, further, That before suspending operation of said railroad or of any service now being rendered thereon, said Eastern Texas Railroad Company shall give at least thirty days' notice to the public of the date at which such service will be discontinued, said notice to be posted in a conspicuous manner in each station on said line of railroad; and

Provided, further, That the Eastern Texas Railroad Company, when making application for cancellation of tariffs, shall refer to this certificate by title, date and docket number.

By the Commission, Division 4.

[SEAL.]

GEORGE B. MCGINTY,

Secretary.

A true copy of the original. I certify.

[SEAL.]

D. H. HART,

Clerk.

By A. B. COFFEE,

Deputy.

(Endorsed:) Filed April 4, 1921. D. H. Hart, Clerk, by A. B. Coffee, Deputy.

The matter before the Court, as I understand it, is limited to the case of the State of Texas against the Eastern Texas Railroad Company, number 323 on the docket. The question of consolidation of the companion case instituted by the Railroad Company is not before the Court. The order issued would be limited to the action brought by the State of Texas against the Eastern Texas Railroad. It is in that case that the motion is made to dissolve the injunction originally issued by Judge Calhoun in the State Court. The case having been subsequently removed to the Federal Court at the instance of the Railroad Company Judge Calhoun's temporary injunction becomes the order of this Court. No motion to remand was made, as I understand it in this case, and no motion to remand having been made I assume that the case has been properly removed and that it stands regularly upon the docket.

The two main issues of law presented by the motion to dissolve, are

First, That the Interstate Commerce Commission's acts in attempting to exercise the functions and duties imposed upon it by the Transportation Act,—and in that Section which authorized the Interstate Commerce Commission to take cognizance of applications for the dismantling and abandonment of railroad properties,—are unconstitutional because Congress, in passing that law, conferred power, or attempted to confer power and authority upon the Interstate Commerce Commission that was not within the contemplation, or the meaning or interpretation, of the original Constitutional Enactment which conferred upon Congress the power to pass laws to regulate commerce among the several states. That is to say, to abandon a railroad and dismantle it is not a regulation of commerce

100 among the States, and unless that Act is within the meaning of those words, then Congress has attempted to do something that it had no power to do, consequently the Section is unconstitutional. Obviously if the statute is unconstitutional, the action taken by the Interstate Commerce Commission, under and by virtue of that Section that attempts to give it that power, would be wholly void, the same as if nothing had been done. It seems to me, looking to the pleadings in the case, that the Court can entertain jurisdiction, and to determine the Constitutional questions.

The second question,—assuming that the Court has jurisdiction, and that the Statute in question is constitutional—is whether the state should not have followed, for its remedy, the procedure specified in one of the Sections of the Act which shows how and in what manner any action by the Interstate Commerce Commission on this particular question may be objected to, and how any rights invaded by reason of it may be saved and preserved as therein set out. This will be referred to later.

On the question of the constitutionality of this Section of the Interstate Commerce Commission Act the Court has not been especially

enlightened or aided by the authorities that have been presented because this is a case of first impression, the Court being called upon to fix a definite meaning of the right to "abandon property in the light of the Constitutional reservation of the National right to 'regulate.'" Counsel, however, have furnished all the authorities there are that bear upon the law of the motion. Being a case of first impression upon the specific point, the Court is obliged to base its ruling upon a reason, and the weight and trend of authorities in general. The history of the interpretation of the Interstate Commerce provision of the Constitution indicates that the power reserved to the Nation by the Constitution lay for a long time dormant. There was hardly

any exercise of that power, and it was many years after the adoption of the Constitution before our necessities required it. Subsequently, by reason of the increase of population,

the necessity for intercommunication, and for countless other reasons, the states have become more dependent upon commerce among one another. The principle of State Sovereignty and the rights which were most zealously guarded by each state have, by force of circumstances, and by the inexorable logic of events, and the times, and of necessity, been practically swept away. The old principle of States' rights considered from the standpoint of today have become merely a sentiment. The trend of authority expressed in the decisions of the Supreme Court of the United States, and by Congress in its Acts, indicates the purpose to extend that power whenever necessary to regulate commerce among the states. The Congress puts the breath of life into interstate commerce and under the authority to regulate extends that power over functions that had theretofore been exercised by the states. Each normal person has a deep and lasting feeling of pride for his native state. Instinctively people are patriotic and loyal, consequently when these Acts of Congress were passed the people of the different states felt that Congress was exercising powers that were attributes of States' sovereignty and not included in the constitutional provisions. The fight between the Nation on the one hand and the states on the other hand has been active, continuous, and persistent for the last forty years. The Act which this Court is called on to interpret is now being considered by the Supreme Court of the United States. There are assembled forty-two states on the one side and the National Government on the other. The states are there contending, as the State of Texas is contending

here, that the Congress has exceeded the constitutional limit in attempting by the Transportation Act of 1920 to confer upon the Interstate Commerce Commission the right of supervision over all property and franchises held by the railroad companies, whether of interstate or intrastate, and in disregard of the rights of the several states. The principles involved in the case before me I believe are the same principles that are now under consideration by the Supreme Court of the United States. It, therefore, seems a waste of effort, a waste of time, and a waste of money for this Court at this time to obtrude its views by an attempt at decision of the great questions. This Court will be deciding nothing, because the Great Court will be speaking finally in a few weeks. Any ex-

tended discussion of the law is useless. Certain "rules" control the trial Court: these are expressed in the Constitution, the Treaties, the Acts of Congress, as interpreted by the National Courts on the one side, and by the Constitution and Acts of the Legislature of the several states, and the mass of judicial interpretative precedents. It is my opinion that the trend of authority, the trend of National Legislation, the preponderance of authority, and of reason, impels the conclusion that this Transportation Act is constitutional. That the forty-two states stand as appellants before the Supreme Court carries the presumption that inferior courts of nisi prius and appeal are holding the view that the Act in question is constitutional. The Court has given dire consideration to the various propositions of law presented and carefully estimated the force and effect of the various decisions of the courts bearing thereon. Particularly has the reasoning of the courts upon which precedents are founded appealed to the Court. There are few, if any, instances where Congress has

extended the power of regulation of inter-state commerce that
 103 have failed to be upheld as Constitutional. The Supreme Court will in all probability hold that the provisions of Congress, conferring power and authority upon the Interstate Commerce Commission to say when railroads shall be extended, or built, or, conversely, when they are to be abandoned, are constitutional, and will be determined to be a regulation of commerce among the states: so believing this Court will so hold.

It may be, perhaps, unnecessary to pass upon the second ground, that is, whether or not the State of Texas has pursued the proper remedy in this case. If the Act is constitutional, then the provisions of the Act, when complied with, necessarily conveys the idea that when those things are performed they are rightfully and lawfully performed. The Court, therefore, holds that if any rights are accorded the interested parties under the Interstate Commerce Commission Act, or any remedies afforded to them thereby, the remedies prescribed by the Act should be followed. Probably the course that the state should have pursued in the matter, assuming the Act to be constitutional, would be to have failed its suit in the Division of the Federal Judicial District where the property is situated, and the Judge there call to his assistance a sufficient court of three Judges, as prescribed by the Statute.

The motion ought to be sustained. The order of the Court will be that the injunction heretofore issued in the state court will be dissolved. I will hear any suggestion by the parties as to the form of the order.

Endorsed: Filed April 4, 1921. D. H. Hart, Clerk, by A. B. Coffey, deputy.

104 In the United States District Court for the Western District
of Texas, Austin Division.

No. 323, Equity.

THE STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY.

Order.

This case coming on to be heard upon the defendants' motion to dissolve the injunction issued by the Honorable George Calhoun, Judge of the District Court of the State of Texas, in and for the Fifty Third Judicial District of Texas, at Austin, Travis County, on the 9th day of July, 1920, and the Court having heard said motion and examined the pleadings of both parties herein filed, heard the evidence offered on said motion and argument of counsel, it is the opinion of the Court that the law is for the defendants and that said motion ought to be sustained.

It is therefore ordered, adjudged and decreed by the Court that the said injunction issued by the Honorable George Calhoun on the 9th day of July, 1920, as aforesaid, be and the same is hereby dissolved, set aside and held for naught, and that the defendants, the Eastern Texas Railroad Company, J. M. Herbert, F. W. Green, E. B. Perkins, Daniel Upthegrove and E. J. Mantooth, recover of the plaintiff, the State of Texas, their costs in that behalf incurred.

Whereupon, this cause coming on for final hearing on the merits thereof, and the Court having heard the pleadings, the evidence and argument of counsel, it is the opinion of the Court that the law is for the defendants and that they are entitled to recover judgment of and from the plaintiff.

It is therefore ordered, adjudged and decreed by the Court that the plaintiff take nothing by its suit and that the defendants, the Eastern Texas Railroad Company, J. M. Herbert, F. W. Green, E. B. Perkins, Daniel Upthegrove and E. J. Mantooth, do have and recover judgment of and from the plaintiff, the State of Texas, and that each of said defendants go hence without day and recover of and from the plaintiff, the State of Texas, all costs in this behalf expended, for which they may have their execution.

Done at San Antonio this March 17th, 1921.

(Sgd.)

DUVAL WEST,

Judge.

To which said judgment the plaintiffs then and there in open court excepted.

[Endorsed:] No. 323, Equity. The State of Texas v. Eastern Texas Railroad Co. United States District Court, Western District

of Texas, Austin Division. Judgment. Entered Equity Journal E—Page 232. Filed Mar. 17, 1921. D. H. Hart, Clerk, by T. H. Thompson, Deputy.

105 In the United States District Court, Western District of Texas,
Austin Division.

In Equity.

STATE OF TEXAS

v.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN,
DANIEL UPTHEGROVE, and E. J. MANTOOTH.

Petition for or Claim of Appeal.

To the Honorable Court of the United States for the Western District
of Texas:

Now comes the plaintiff herein, by C. M. Cureton, Attorney General of the State of Texas, Bruce W. Bryant, Tom L. Beauchamp and Wallace Hawkins, its solicitor, and says that plaintiff is aggrieved by the order of this Honorable Court entered on the 17th day of March, 1921, in the above cause, by which order the temporary injunction restraining the defendants herein from abandoning the Eastern Texas railroad and ceasing and discontinuing the operation of said railroad or any part thereof for the transportation of passengers and freight in interstate commerce was dissolved, in that plaintiff is denied the right to effectively enforce the statutes of the State of Texas regulating, controlling and governing the abandonment of the operation and dismantling of physical properties of intrastate railways, and to force the Eastern Texas Railroad

106 to comply with its charter contract and the pre-existing laws
of the State of Texas by which it is compelled to operate its
trains until November 1st, 1925.

Further the plaintiff herein is aggrieved by the judgment of this Honorable Court denying the plaintiff the remedies sought in its petition and giving judgment for the defendant herein, and plaintiff claims an appeal therefrom and prays that the same may be allowed by an order of this Honorable Court, and that the record may be duly certified and forwarded to the Supreme Court of the United States in order to perfect said appeal.

C. M. CURETON,

Attorney General;

BRUCE W. BRYANT,
TOM L. BEAUCHAMP,
WALLACE HAWKINS,

Assistant Attorneys General,

Solicitors for Plaintiff.

Endorsed: In the United States District Court, Western District of Texas—Claim for Appeal—State of Texas v. Eastern Texas Railroad Company et al. In Equity. Filed April 2, 1921. D. H. Hart, District Clerk, by A. B. Coffee, Deputy.

107 In the United States District Court, Western District of Texas,
Austin Division.

In Equity.

STATE OF TEXAS

v.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN,
DANIEL UPTHEGROVE, and E. J. MANTOOTH.

Assignment of Error.

Now comes the plaintiff in the above entitled cause and files the following assignments of error upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the order dissolving temporary injunction and from the judgment made herein by this Honorable Court on the 17th day of March, 1921.

1.

That there is manifest error on the face of the record in the above entitled cause in that the Court erred in considering and in giving force and effect to the Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission on December 2, 1920 "in the matter of application of the Eastern Texas Railroad Company for a Certificate of Convenience and Necessity, Finance Docket No. 4, Application No. 1, A 6-1."

2.

That the Court erred in its ruling denying and refusing plaintiff the right and opportunity of introducing testimony as shown in the record, showing and tending to show that the findings of the Interstate Commerce Commission in Finance Docket No. 4 were untrue, and that such order of said commission was arbitrary, unreasonable and unjust and without evidence to support it, and contrary
106 to law and the evidence.

3.

That the Court erred in its holding that subdivision- 18, 19, 20, of Section 1 of the Interstate Commerce Commission Act as amended February 28, 1920, were constitutional and that the law was for defendants in said cause.

4.

That the Court erred in holding that the proper interpretation of subdivisions 18, 19, 20, 21 of Section 1 of the Interstate Commerce Commission as amended February 28, 1920, grants to the Interstate Commerce Commission authority to order the Eastern Texas Railroad Company to abandon operation and dismantle its property contrary to the laws of Texas and contrary to its charter contract.

Wherefore appellants pray that said decree be reversed and that said District Court for the Western District of Texas be ordered to enter a decree reversing its order dissolving the injunction and its decision that the law is for the defendant in said cause.

C. M. CURETON,

Attorney General;

BRUCE W. BRAYNT,

TOM L. BEAUCHAMP,

WALACE HAWKINS,

Assistant Attorneys General,

Solicitors for Plaintiff.

Endorsed: Assignments of Error. State of Texas v. Eastern Texas Railroad Co. et al. In Equity No. 323. Filed Apr. 2, 1921. D. H. Hart, District Clerk. By A. B. Coffee, Deputy.

109 In the United States District Court, Western District of Texas, Austin Division.

In Equity.

STATE OF TEXAS

v.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN, Daniel Upthegrove, and E. J. Mantooth.

Order Allowing Appeal.

At a session of said court held at 10 o'clock in the Federal Building in the City of San Antonio, Texas, on the 2 day of April, 1921. Present, Hon. Duval West, District Judge.

On reading and filing in the above entitled cause the petition of defendants for an appeal to the Supreme Court of the United States it appearing to the court that the plaintiffs have filed their assignments of error and claim of appeal as required by the rules of the Supreme Court of the United States, it is

Ordered that an appeal be and the same is hereby allowed as prayed for from the order made on the 17th day of March, A. D. 1921, granting a dissolution of injunction as prayed for by defend-

110 ants and also appeal is allowed from judgment for defendants in this cause.

DUVAL WEST,
District Judge.

Endorsed - Filed April 2, 1921. D. H. Hart, Clerk, By A. B. Coffee, Deputy.

111 THE UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

The President of the United States to Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, Appellees, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to appeal allowed and filed in the Clerk's office of the District Court of the United States for the Western District of Texas, in the cause wherein The State of Texas is appellant and Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, are appellees, to show cause, if any there be, why the decree rendered against the said The State of Texas, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 2nd day of April in the year of our Lord one thousand nine hundred and twenty one.

Signed this, the 2nd day of April, 1921.

[The Seal of the U. S. District Court, Western Dist. Texas,
Austin.]

DUVAL WEST,
United States Judge.

[Endorsed] No. 323 Eq. The State of Texas vs. Eastern Texas Railroad Co., et al. Citation. Marshal's Return. Service of this Citation is hereby accepted this April 2, 1921. E. B. Perkins, Daniel Upthegrove, E. J. Mantooth, Solicitors for Appellees, Filed April 1, 1921. D. H. Hart, Clerk, By A. B. Coffee, Deputy.

112 In the United States District Court, Western District of Texas, Austin Division.

In Equity.

No. 323.

STATE OF TEXAS

v.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN,
Daniel Uphegrove, and E. J. Mantooth.

Stipulation.

For the purpose of reducing the size of transcript of the record in the above entitled cause on appeal from the order dissolving the temporary injunction made on the 17th day of March, 1921, and from the judgment of the court denying plaintiff relief and remedy sought in its petition, it is stipulated between the parties herein by their respective solicitors that the transcript of the record on such appeal shall embody the following portions and no other portions of the record in the above entitled cause:

1.

Bill of complaint filed in the 53rd District Court of Travis County, Texas, on July 9th, A. D., 1920, and supplemental bill of complaint or petition filed the 14th day of January, A. D., 1921 in
113 the District Court of the United States for the Western District of Texas.

2.

Defendant's answer to the bill of complaint filed the 15th day of November, A. D. 1920, and supplemental answer filed December 18, A. D. 1920.

3.

Defendant's application and bond for removal from the State Court to the Federal District Court for the Western District of Texas, and the order granting such removal.

4.

The order of temporary injunction granted in the State Court July 9, 1920.

5.

Defendant's motion to dissolve the temporary injunction and supplemental motion filed December 18, 1920, and March 14, 1921, respectively.

6.

Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission of date December 2, 1920, "In the Matter of Application of the Eastern Texas Railroad Company for a Certificate of Convenience and Necessity, Finance Docker No. 4, Application No. 1AB —1."

7.

The court's conclusions of law upon which judgment was entered.

8.

Order of the court entered March 17 dissolving the temporary writ of injunction; and order giving judgment to defendant in the cause.

9.

Plaintiff's claim of appeal.

10.

Plaintiff's assignments of error.

114

11.

Order allowing appeal.

12.

Citation on appeal and acceptance of service.

13.

This praecipe and stipulation.

14.

Statement of evidence.

C. M. CURETON,

Attorney General.

TOM L. BEAUCHAMP.

WALACE HAWKINS.

BRUCE W. BRYANT.

Assistant Attorneys General.

Solicitors for Plaintiffs.

E. B. PERKINS.

DANIEL UPTHEGROVE.

E. J. MANTOOTH.

Solicitors for Defendants.

Endorsed: Stipulation for Appeal Record—State of Texas vs. Eastern Texas Railroad Co. et al. In Equity No. 323. Filed April 4, 1921. D. H. Hart, District Clerk, by A. B. Coffee, Deputy.

115 In the United States District Court, Western District of Texas,
Austin Division.

No. 323, Equity.

STATE OF TEXAS

VS.

EASTERN TEXAS RAILROAD COMPANY et al.

Statement of Evidence.

It is hereby agreed by and between the State of Texas, plaintiff, by and through the Attorney General, C. M. Cureton, and Bruce W. Bryant, Tom L. Beauchamp, and Wallace Hawkins, Solicitors for the State of Texas, and the Eastern Texas Railroad Company, et al., defendants, through E. B. Perkins, Daniel Upthegrove, and E. J. Mantooth, Solicitors for defendants, that on the hearing of this cause it was agreed and stipulated in open court that, first, the Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission in Finance Docket No. 4, Application No. 1Abl, dated December 2nd, 1920, copy of which is attached as an exhibit to the defendants' supplemental answer filed herein, shall be considered in evidence and the same is here referred to to the same extent and force and effect as if copied in full herein and that all of the conditions contained in said Certificate of Public Convenience and Necessity, which conditions are as follows, to wit:

"Provided, however, that the Eastern Texas Railroad Company shall first offer all of the property now owned by it for sale, free of all encumbrances, for a sum not to exceed \$50,000 to any party or parties interested in the community served by said road on condition that the purchaser at such sale shall continue the operation of said lines of railroad;

"Provided, further, That the Eastern Texas Railroad Company be, and it is hereby, required to furnish to the Interstate Commerce Commission a good and sufficient bond secured by the St. Louis Southwestern Railway Company in the penal sum of \$100,000, to be approved by the Secretary of the Interstate Commerce Com-

116 mission, conditioned on the understanding that the said Eastern Texas Railroad Company will, before the expiration of one year after the date of this certificate, adjust, settle and pay all outstanding debts, obligations, judgments, liens or mortgages, together with all taxes and assessments, Federal, state or municipal, due or to become due, and all claims or judgments for damages to persons or property.

"Provided, further, That before suspending operation of said railroad or of any service now being rendered thereon, said Eastern Texas Railroad Company shall give at least thirty days' notice to the public of the date at which such service will be discontinued, said notice to be posted in a conspicuous manner in each station on said line of railroad."

have, in whole and in all of its parts, been complied with by the Eastern Texas Railroad Company, and that said conditions have been entirely and completely satisfied, except that the thirty full days' notice to the public of abandoning operation of said railroad has not yet been completed, but is now being given for the abandonment of the operation of said railroad, at 12:01 a. m. May 1st, 1921.

Witness our hands this 2nd day of April, 1921.

C. M. CURETON,

Attorney General;

TOM L. BEAUCHAMP,

BRUCE W. BRYANT,

WALACE HAWKINS,

Assistant Attorneys General,

Solicitors for Plaintiff, State of Texas.

E. B. PERKINS,

DANIEL UPTHEGROVE,

E. J. MANTOOTH,

Solicitors for Defendants,

Eastern Texas Railroad Company et al.

Endorsed: In United States District Court, for Western District of Texas, Austin Division. Equity No. 323, State of Texas v. Eastern Texas Railroad Company et al.—Agreement and Stipulation as to publication of notice and offer of sale as conditions in Certificate of Public Convenience issued by the Interstate Commerce Commission in Finance Docket No. 4. Filed April 4, 1921. D. H. Hart, Clerk, by A. B. Coffee, Deputy.

117

Clerk's Certificate.

THE UNITED STATES OF AMERICA,
Western District of Texas:

I, D. H. Hart, Clerk of the United States District Court for the Western District of Texas, do hereby certify that the foregoing, on pages numbered 1 to 116, inclusive, contain a true and correct transcript of the proceedings had and orders entered as therein stated, except that the original citation instead of a copy thereof, is included on page 111 in cause No. 323, Equity, styled The State of Texas, vs. Eastern Texas Railroad Company et al, embraced in the Transcript of said Court issued on the removal of the cause in the State Court to this Court, as the same appear on file and of record in this office, and

I do further certify that the foregoing record embraces only such pleadings and orders as are specified in the praecipe filed by appellant and agreed to by appellees.

Witness my official signature and the seal of said District Court, at office in the City of Austin, Texas, the 5 day of April, 1921.

[The seal of the U. S. District Court, Western Dist. Texas, Austin.]

D. H. HART,

Clerk,

By A. B. COFFEE,

Deputy.

Endorsed on cover: File No. 28,227. W. Texas D. C. U. S. Term No. 870. The State of Texas, appellant, vs. Eastern Texas Railroad Company et al. Filed April 13th, 1921. File No. 28,227.

Office Supreme Court, U. S.

FILED

APR 18 1921

JAMES D. MAHE

No. **8 298**

IN THE
Supreme Court of the United States

APRIL TERM, 1921

THE STATE OF TEXAS

v. S.

EASTERN TEXAS RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS FROM AN
ORDER DISSOLVING A TEMPORARY
INJUNCTION.

APPLICATION FOR SUPERSEDEAS, OR AN
ORDER SUSPENDING THE DECREE DIS-
SOLVING THE TEMPORARY INJUNC-
TION TO MAINTAIN THE STATUS
QUO PENDING THE APPEAL.

C. M. CURETON, *Attorney General,*
BRUCE W. BRYANT,
WALACE E. HAWKINS,
TOM L. BEAUCHAMP,

Assistant Attorney Generals,
Solicitors for Appellant.

IN THE
Supreme Court of the United States

APRIL TERM, 1921

THE STATE OF TEXAS

v.s.

EASTERN TEXAS RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS FROM AN
ORDER DISSOLVING A TEMPORARY
INJUNCTION.

Now comes the State of Texas, a Sovereign State of the Union, acting by and through its duly elected, qualified and acting Attorney General, C. M. Cureton, appellant, and makes application for an order suspending the decree of the United States District Court for the Western District of Texas dissolving the restraining order theretofore granted by the Hon. George Calhoun, Judge of the 53rd Judicial District Court of the State of Texas, dated the 9th day of July, A. D. 1920, while said cause was pending in said court and prior to its removal to the Federal District Court for the Western District of Texas by order entered on the 19th day of October, 1920, or a temporary injunction, to preserve the status quo pending this appeal and, in support thereof, states the following reasons and facts:

(1) At the session of the legislature of the State of Texas of 1889 a law was passed prohibiting a railroad company within the State of Texas from abandoning the operation of trains when once said railroad had been incorporated, constructed, and permitted by the laws of Texas to operate trains as a common carrier and had done so; said law has been at all times, and is now in force in the State of Texas and has never been repealed.

(2) On the 8th day of November, 1900, the Eastern Texas Railroad Company filed its articles of association in the office of the Secretary of State of the State of Texas, and thereby and thereafter became a corporation under the laws of the State of Texas for the purpose of constructing, owning, maintaining and operating a railroad from the town of Lufkin, in Angelina County, State of Texas, to the city of Crockett, in Houston County, Texas. In said charter it was declared that the corporation should begin to exist on the 1st day of November, 1900, and continue as a corporation for a period of twenty-five years. Thereafter and during the year 1902 said corporation had completed the construction and begun the operation of trains on said line of railroad for a distance of thirty-one miles from the town of Lufkin to the town of Kennard, in Houston County, at which place it erected an office building and established its general offices and became in all respects a common carrier under the laws of the State of Texas, subject to the Constitution and Laws of the State, and compelled to operate trains in accordance therewith and in accordance with the provisions of its charter, which, upon the approval of the Secretary of State, when filed, became a charter contract between the said railroad company and the State of Texas.

(3) That on or about the 20th day of August, 1906, plaintiff sold its net current assets and its rolling stock to the Louisiana and Texas Lumber Company, and on Septem-

ber 1st, 1906, the St. Louis Southwestern Railway Company, a Missouri corporation, acquired the capital stock of the Eastern Texas Railroad Company and still owns the entire capital stock except four shares held by individuals for the purpose of qualifying them to act as directors; and that, thereupon and ever since, the Eastern Texas Railroad Company has been operated as a branch of the St. Louis Southwestern Railway Company of Texas, which is in fact owned by the St. Louis Southwestern Railway Company, a Missouri Corporation.

(4) That on the 3rd day of June, 1920, the Eastern Texas Railroad Company, acting in its corporate name, filed with the Interstate Commerce Commission at Washington, D. C., an application for a certificate of public convenience and necessity, praying that it be granted authority to abandon its said line of railway and the stations thereon and on the 2nd day of December, 1920, the Interstate Commerce Commission, upon its findings, entered an order directing the abandonment of said railroad's line of railway and stations thereon, in accordance with its application and upon certain conditions therein named but not material to this application.

(5) On the 9th day of July, 1920, prior to the order of the Interstate Commerce Commission granting the certificate of convenience and necessity to the Eastern Texas Railway Company, the State of Texas filed suit in the District Court of the 53d Judicial District of the State of Texas and applied for an injunction restraining the Eastern Texas Railroad Company and E. B. Perkins, F. W. Green, Daniel Upthegrove, and E. J. Mantooth, from abandoning the operating of trains on said line of railroad or any part thereof for transportation of passengers and freight in intrastate commerce, and dismantling same, and seeking a temporary injunction to this effect and praying that same be made permanent upon the hearing of said cause.

(6) That on the 9th day of July, 1920, a temporary injunction was granted by Hon. George Calhoun, Judge of the 53rd Judicial District Court of the State of Texas restraining the defendants in said cause named in accordance with the prayer of the State of Texas herein above alleged, which said restraining order was duly issued by the Clerk of the Court on the 9th day of July, 1920, and in proper time duly served on each of the parties named.

(7) Upon the application of the defendants in said suit Hon. George Calhoun, Judge, did on the 19th day of October, 1920, enter an order removing said cause to the Federal Court for the Western District of Texas.

(8) On the 15th day of March, 1921, the case of the State of Texas vs. Eastern Texas Railway Company, et al., being the cause on appeal, came on to be heard before the Hon. DuVall West, Judge of the Federal District Court for the Western District of Texas at San Antonio, Texas, and thereupon the Eastern Texas Railroad Company filed its motion to dissolve the injunction theretofore granted in said cause alleging in substance that the matters and things which it had been restrained from doing were matters and things authorized to be done by the Constitution and laws of the United States and were lawful and could not be lawfully restrained by a writ of injunction from the District Court of the State of Texas nor by writ of injunction from the Federal District Court for the Western District of Texas; that the Constitution of the United States authorized Congress to pass all laws necessary to carry into effect the provisions of the Constitution authorizing them to regulate commerce and that by the enactment of the Transportation Act of 1920, Congress had conferred upon the Interstate Commerce Commission full power and authority to issue to the Eastern Texas Railroad Company a certificate of public convenience and necessity, empowering and authorizing said railroad company to abandon the operation

of its line of railway and take up and remove its tracks, structures and property constituting same, and to make lawful disposition thereof or dispose of the same either in whole or in part; and that, upon application of the Eastern Texas Railroad Company, the Interstate Commerce Commission had made, under the provisions of said Transportation Act, an order so authorizing the Eastern Texas Railroad Company to so abandon operation of its line of railway and take up and remove the tracks, structures, and property constituting same and to dispose of same, by order dated December 2, 1920, and that because of said order all legal questions had been foreclosed and the District Court for the Western District of Texas could not hear and determine the matters attempted to be raised by the pleadings of the State of Texas.

(9) Upon the hearing of the motion to dissolve, the Hon. DuVall West, Judge of the District Court for the Western District of Texas, did on the 17th day of March, 1921, enter his order dissolving the writ of injunction, holding that the certificate of convenience and necessity issued by the Interstate Commerce Commission precluded further litigation and declining to hear testimony in said cause.

(10) The appellee, the Eastern Texas Railroad Company, has never made application to the State of Texas nor to the legislature of the State of Texas asking for a permit or a special act to permit it to abandon the operation of its trains and dismantle its road, and none has been granted.

(11) The Eastern Texas Railroad Company had received donations of right-of-way when its line of railway was constructed and sold to purchasers the town lots in the town of Kennard and established said town, and the purchasers who bought same built homes, business houses, and shops of a permanent nature and have continued to make their homes in said town.

(12) In the pleadings of the State of Texas it was denied that the Eastern Texas Railroad Company had not made money in its operation, and the State alleged that if it were losing money it was only temporary and that conditions existed and the prospects were that the said railroad would be on a paying basis within a short period of time if it were not then doing so. Proof was offered to the court in substantiation of this, but was refused as is shown by the records of the appeal in this case, because the Court held that the order of the Interstate Commerce Commission foreclosed further litigation of the matter.

(13) It is further alleged by the State of Texas that the St. Louis Southwestern Railway Company had absorbed all of the stock of the Eastern Texas Railroad Company in 1906, and had ever since and still owns all of the same except the qualifying shares held by directors; that the St. Louis Southwestern Railway Company of Texas operates the Eastern Texas Railroad as a part of its system of approximately 800 miles in the State of Texas and of 1,700 miles within the United States owned by the St. Louis Southwestern Railway Company, a Missouri corporation. That their officers are identical except a few directors; that the superintendent of operation is the same person as the superintendent of the St. Louis Southwestern Railway Company of Texas as well as the Auditor, Treasurer, and General Manager and that all of its business is carried on and operated by the St. Louis Southwestern Railway Company of Texas. This pleading is in accordance with the finding of the Interstate Commerce Commission and is not denied by the Eastern Texas Railroad Company, but such finding is attached to its pleading in another suit filed, styled "Eastern Texas Railroad Company vs. Railroad Commission of Texas, et al.," and is admitted to be a fact. The State of Texas alleged in its pleading that the Inter-

state Commerce Commission had no authority under the law to authorize a railroad to abandon a part of its line of railway without a showing that its entire system is losing money, and that the abandonment of the portion authorized would relieve its distressed condition.

(14) No pleadings in the case alleged and no effort was made to show before the Interstate Commerce Commission that the St. Louis Southwestern Railway Company was losing money and that the abandonment of the line known as the Eastern Texas Railroad Company would relieve the distressed corporation.

(15) The Eastern Texas Railroad Company is now proceeding in accordance with the certificate of convenience and necessity issued to it by the Interstate Commerce Commission and has given notice that it will on the 1st day of May, 1921, cease operation of its trains and proceed to carry into effect and exercise the privileges granted to it by said certificate.

(16) If permitted to do so, and unless restrained by order of this court to which an appeal has been duly taken by the State of Texas and allowed by the Hon. DuVall West, Judge of the Federal District for the Western District of Texas and which cause has been docketed by the Clerk of this court, the appellees will proceed to abandon operation of its trains and to dismantle and dispose of its railway and physical properties and thereby destroy the subject matter of this litigation before the final determination of the matter in controversy and defeat the right of the State of Texas to appeal the said cause to the Supreme Court of the United States and there have determined the constitutionality of the Act of the State of Texas compelling railroads subsequently chartered to operate its trains and carry on intrastate commerce within the State of Texas until permitted by the State of Texas to abandon same and to deter-

mine if the Act of Congress known as the Transportation Act of 1920, in so far as it seeks to control the physical property of a railroad wholly within a State, is Constitutional and does by its terms grant to the Interstate Commerce Commission authority to order the abandonment of line of railway chartered by State contrary to its charter contract and pre-existing laws of the State, said road being situated wholly within the State, and whether or not it has authority to authorize a railroad to abandon a part of its line of railway in the absence of a showing that the entire system is losing money. The State of Texas has no other means or remedy of compelling appellees to preserve the property and keep themselves in a position to abide the final decree and judgment of this Court, and if this supersedeas or order suspending the decree dissolving the restraining order or temporary injunction be not granted, the question presented in the appeal will become a moot question and the jurisdiction of this court thereby destroyed.

(17) The statements made in this application are from the pleadings and are admitted unless and except in the instances indicated by the wording hereof.

WHEREFORE, The appellant prays this Court to grant a proper order suspending, pending appeal, the judgment and decree appealed from in so far as it dissolve the restraining order heretofore issued, and in so far as same would authorize the Eastern Texas Railroad Company to dismantle its line of railway and dispose of all or any part of its physical property, or, in the alternative, to grant a temporary injunction pending the appeal, issuing out of this court in terms of the restraining order granted below to the end and effect that appellees shall not be permitted to destroy or dispose of its physical properties or do anything that will preclude it from answering the judgment of this court and resuming operation of trains on its line of railway should

the final order of this court compel it to do so, or to make such other order as will afford the appellant protection pending the appeal.

THE STATE OF TEXAS,
By C. M. CURETON, *Attorney General*,
BRUCE W. BRYANT,
WALACE E. HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorney Generals,
Solicitors for Appellant.

THE DISTRICT }
OF COLUMBIA } ss.

Tom L. Beauchamp, being duly sworn deposes and says that he is one of the solicitors for the appellant named in the foregoing motion and is familiar with the facts therein set forth; and affiant further states that the facts stated in the foregoing application are true as therein stated.

.....
Subscribed and sworn to before me, on this — day
of April, A. D. 1921.

.....

.....

Service of the foregoing application is acknowledged on this — day of April, A. D. 1921.

.....

Solicitor for Appellees.



Office Supreme Court

FILED

APR 18 1921

JAMES D. MAHE

No. 870 **298**

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

STATE OF TEXAS

v's.

EASTERN TEXAS RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS FROM AN
ORDER DISSOLVING A TEMPORARY
INJUNCTION

BRIEF AND ARGUMENT

UPON APPELLANT'S APPLICATION FOR SUPER-
SEDEAS, OR AN ORDER SUSPENDING THE
DECREE DISSOLVING THE TEMPORARY
INJUNCTION TO MAINTAIN THE
STATUS QUO PENDING THE
APPEAL

C. M. CURETON, *Attorney General*,
BRUCE W. BRYANT,
WALACE E. HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorney Generals,
Solicitors for Appellant.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1920

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS FROM AN
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BRIEF AND ARGUMENT

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INJUNCTION TO MAINTAIN THE
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APPEAL

1. The pre-existing statute of the State of Texas forbidding abandonment of a railroad and its application to the Eastern Texas Railroad is admitted by appellees. That it became a part of its charter contract has often been held

by this court. That it is binding even when the railroad is losing money has never been specifically determined, but such is strongly intimated in the case of Brooks-Scanlon Company vs. Railroad Commission, 251, U. S. Report, page 369, and in the recent case from Florida, not yet reported in bound volume, but referred to as the Bullock Case. Also in the case of Missouri Pacific Railroad Company vs. Kansas, 216 U. S. 262, it is asserted that the State has the right to control the physical properties of a railroad so long as it does not interfere with interstate commerce. The Transportation Act of 1920 gives no new grounds upon which a railroad may abandon operations but only a new procedure, designed for the purpose of protecting interstate commerce, and gives to the Interstate Commerce Commission authority to refuse it in the event such abandonment would work an injury to interstate commerce. The right of the State is recognized and the wording of the Act, compared with the wording of the same Act with reference to rates and to the issuance of securities, shows clearly Congress did not attempt to grant such authority contrary to the laws of a State. With reference to the fixing of rates, Section 13 (4) says in part:

“* * * Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, *the law of any State or the decision or order of any State authority to the contrary notwithstanding.*”

Similar language is used with reference to securities but no such inhibition is placed against a State exercising its powers under its laws with reference to abandonment of railroads. We contend, therefore, that the adjective and not the substantive law is changed by the Act, and no denial

of the State's power to control the physical properties is contained in the act. And that, as formerly, all pre-existing laws enter into the charter contract and are not nullified as claimed by appellees.

2. Whether or not the Eastern Texas Railroad is a part of the system of the St. Louis Southwestern is a question of law for this court to determine. The facts are undenied. It cannot be denied that, if it is, the order of the Interstate Commerce Commission, denominated a certificate of convenience and necessity, is void for want of authority of law. Upon this question the court below refused to hear testimony. In its finding, attached as "Exhibit A" to appellee's answer to the Motion for Injunction, the Interstate Commerce Commission said:

"On September 1, 1906, all outstanding stock of the Eastern Texas was acquired by the St. Louis Southwestern Railway Company, * * * which except for the director's qualifying shares still holds it. There is substantial identity between the officers of the Eastern Texas and the Southwestern."

Authority.

Chicago, Milwaukee & St. Paul Railway Co. et al.

vs.

Minneapolis Civic and Commerce Association,
247 U. S. Reports, page 490.

3. This suit originated in the State court prior to the order of the Interstate Commerce Commission. It is not a suit brought either to enforce or set aside an order of the Interstate Commerce Commission. It had been removed to the Federal Court and was there pending on substantial issues at the time the certificate of convenience and necessity was issued. The court had jurisdiction and so held. He, therefore, had jurisdiction to hear and determine all matters in controversy. Defendants then pleaded the order

of the Interstate Commerce Commission. If the order of the Interstate Commerce Commission and its validity became an issue, the court had a right to determine this along with other questions. This court has such jurisdiction and the appellees should not be permitted to destroy the subject matter of the litigation during the pendency of this appeal.

4. Under the laws of the State of Texas, it cannot become the principal or surety on any bond. In no way would a bond bind it in damages. It cannot, therefore, offer to make bond to secure appellees against damage by reason of an injunction issued by this court. No bond has been required of it on this appeal. For that reason we do not ask an injunction or order compelling appellees to operate trains and otherwise incur expense, but merely to prohibit it from removing its tracks and disposing of its properties during the pendency of the appeal. It owns no rolling stock except one combination passenger and express car. It has shown no way by which it would be damaged if this injunction or restraining order be granted and none can be contemplated. On the other hand, if it be not granted, appellees admit they will proceed to dismantle the road and dispose of the property. According to the records the company is solvent. It owes no debts. If it be compelled to keep its property in status quo pending this appeal, it will be able to abide the final judgment in this court. If not, and it disposes of its property as it admits it will, it would become insolvent and could not then be compelled to rebuild its tracks and operate its trains. The question at issue would become a moot question and the jurisdiction of the court destroyed.

We respectfully submit that no damage would result to appellees by reason of an injunction or restraining order

as prayed for and that a failure to grant it would result in destroying the subject matter of the litigation and the State of Texas would be defeated in its right to have the matters at issue decided by the Supreme Court.

C. M. CURETON, *Attorney General*,
BRUCE W. BRYANT,
WALACE E. HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorney Generals,
Solicitors for Appellant.

No. 8 298

FILED

APR 18 19

JAMES D. M

IN THE
Supreme Court of the United States

OCTOBER TERM, 1920

STATE OF TEXAS

vs.

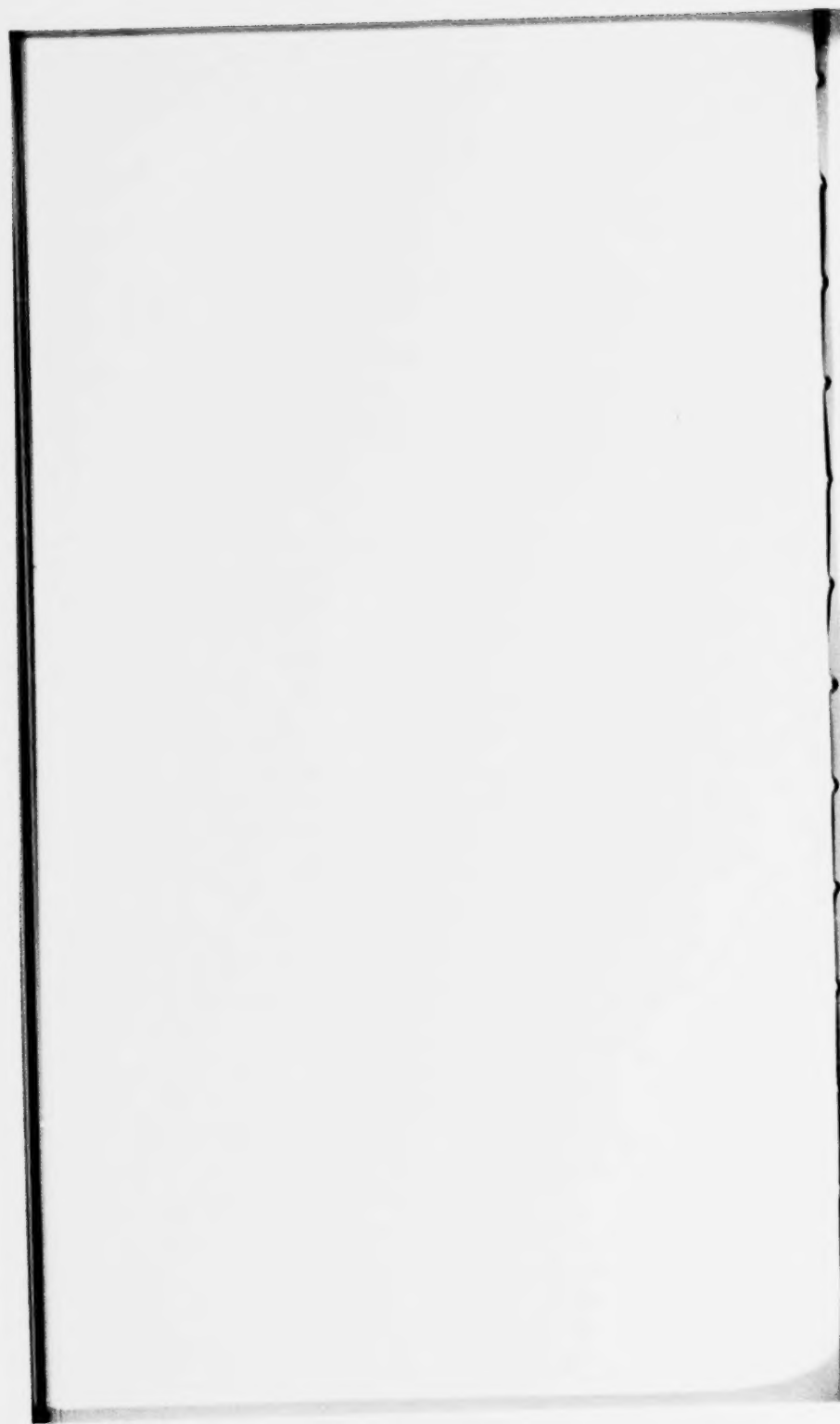
EASTERN TEXAS RAILROAD COM-
PANY, ET AL.

No. ———.

*Appeal from the District Court of the United
States for the Western District of Texas.*

**Answer of Defendants to Application of the State of
Texas for Supersedeas or an Order Suspending the
Decree Dissolving the Temporary Injunction to Main-
tain the Status Quo Pending the Appeal.**

DANIEL UPTHEGROVE,
E. B. PERKINS,
Solicitors for Defendants.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1920

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COM-
PANY, ET AL.

No. _____.

*Appeal from the District Court of the United
States for the Western District of Texas.*

Now comes the EASTERN TEXAS RAILROAD COMPANY, a railway corporation, E. B. PERKINS, F. W. GREEN, DANIEL UPTHEGROVE, and E. J. MANTOOTH, defendants in the above-entitled action, and for answer to the application by the State of Texas for an order suspending the decree of United States District Court for the Western District of Texas, dissolv-

ing the restraining order heretofore granted in this cause and for this Court to grant an injunction to preserve the *status quo* pending this appeal, and say—

I.

Defendants admit the facts alleged in paragraph (1) of said application, except that the law of Texas permitting the abandonment of railroads and the operation thereof has never been repealed, but say that said laws of the State of Texas have been repealed by the Acts of Congress hereafter referred to.

II.

Defendants admit the facts alleged in paragraph (2) of said application, except the fact that the charter heretofore granted by the State of Texas to the defendant, Eastern Texas Railroad Company, was a charter contract between said railroad and the State of Texas; and says that said charter was granted by said State subject to the paramount authority of Congress to amend, cancel or set aside the same.

III.

Defendants admit the facts alleged in paragraph (3) of said application, except the fact that since the acquisition of the stock of the Eastern Texas Railroad Company by the St. Louis South Western Railway Company that the said Eastern Texas Railroad Company has been operated as a branch

of the St. Louis South Western Railway Company of Texas; and say that the said Eastern Texas Railroad Company is now and has always been operated as an independent corporation in accordance with the laws of the State of Texas.

IV.

Defendants admit the facts alleged in paragraph (4) of said application, and that the Interstate Commerce Commission on December 2, 1920, issued its report and order authorizing the Eastern Texas Railroad Company to abandon its line of railroad and to take up, dismantle, or remove any part or all of the property of said company, and in any lawful manner dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated; that in granting said certificate of public convenience and necessity the Interstate Commerce Commission fully complied with all the terms, conditions and requirements of Section 1 of the Act to Regulate Commerce as amended by paragraphs (18), (19) and (20) of the Transportation Act of 1920; that for the convenience of the Court copy of said report and order of the Interstate Commerce Commission is hereto attached, marked "Exhibit A" and made a part hereof.

V.

The defendants admit the facts alleged in paragraph (5) of said application.

VI.

Defendants admit the facts alleged in paragraph (6) of said application.

VII.

The defendants admit the facts alleged in paragraph (7) of said application.

VIII.

Answering paragraph (8) of said application, defendants admit the facts set up and alleged as facts, but say that there are no facts alleged in said paragraph sufficient to show any grounds for equitable relief, but that the matters therein alleged are statements of legal conclusions and are immaterial and irrelevant.

IX.

Defendants admit the facts alleged in paragraph (9) of said application.

X.

Defendants admit as alleged in paragraph (10) of said application that the Eastern Texas Railroad Company has never made application to the State of Texas, nor to the Legislature of said State asking for the permit to abandon the operation of the trains and dismantle its road; but says

that it did obtain authority from the Interstate Commerce Commission to abandon the operation of its trains and dismantle its road as hereinbefore stated and that the power granted by Congress to grant said defendant the right to abandon said road was paramount, and that it is not and was not necessary to obtain the consent of the State of Texas so to do.

XI.

Defendant, Eastern Texas Railroad Company admits as alleged in paragraph (11) of said application that it received certain donations of right-of-way when its line was constructed, and it is without sufficient knowledge to affirm or deny the allegations in said paragraph that a town was established by said railroad company and that the purchasers who bought same built houses, business houses and shops of a permanent nature, but say that all the allegations in said paragraph are immaterial and irrelevant and show no grounds for equitable relief by the State against said railroad company.

XII.

The defendants admit the facts plead by the State of Texas in paragraph (12) of said application, except the fact alleged that all of the business of the Eastern Texas Railroad Company is carried on and operated by the St. Louis & South Western Railroad Company of Texas; that the

business of the Eastern Texas Railroad is carried on, and said line is operated by said company, and is not carried on and operated by the said St. Louis South Western Railway Company as therein alleged.

XIII.

Defendants admit the facts alleged in paragraph (13) of said application except that all the business of the Eastern Texas Railroad is carried on and operated by the St. Louis Southwestern Railway Company of Texas, but deny said facts and allege that said Eastern Texas Railroad Company in its own corporate capacity carries on its business and operates its said line of railroad.

XIV.

Defendants admit the facts alleged in paragraph (14) of said application but say that said facts are immaterial, irrelevant, and show no ground for equitable relief by the State of Texas.

XV.

Defendants admit the facts alleged in paragraph (15) of said application.

XVI.

For answer to paragraph (16) of said application defendants admit that unless restrained by an

order of this Court that it will proceed to carry out the order heretofore entered by the Interstate Commerce Commission as herein alleged, but defendants deny that the State of Texas has the right to enjoin said Eastern Texas Railroad Company from dismantling and disposing of its property as authorized by the Interstate Commerce Commission, as will be hereinafter more fully set out.

Defendants deny the legal conclusions therein plead and say that the same are immaterial and irrelevant and show no grounds of equitable relief.

XVII.

Answering further herein defendants say that as hereinbefore alleged the Interstate Commerce commission in granting said certificate of public convenience and necessity to the said Eastern Texas Railroad Company has fully complied with all of the terms, conditions and requirements of the Acts of Congress authorizing the abandonment of railroads; and that said order of the Interstate Commerce Commission is binding, final and conclusive on both the United States District Court for the Western District of Texas, before whom this case was tried and upon this Court, and is not subject to collateral attack by the State of Texas in this cause.

XVIII.

For further answer herein the defendants say that the Interstate Commerce Commission made

the following finding of facts as to physical condition of the Eastern Texas Railroad Company: "The line was laid with 35 pound steel rails which are not badly worn but are both line and surface bent to such an extent that it is said trains cannot safely be operated over them at a speed exceeding 12 or 15 miles an hour. Many streams run at right angles across the railroad's right of way and, in addition to numerous cuts and fills there are 50 bridges and trestles with a combined length of 8,862 feet, which range in height from 5 to 25 feet. The roadbed, trestles and bridges have not been well maintained, but the ties are in fair condition."

The defendant, Eastern Texas Railroad Company, further shows that if it is not permitted to at once take up, dismantle, and remove all of the said property that by reason of its physical condition as shown by said finding of the Interstate Commerce Commission, that it will suffer great and irreparable loss and damage, and that it will be unable to salvage said property; that the State of Texas has not tendered to this Court any bond or other security to protect and indemnify said railway company from loss and damage during the pendency of this appeal, and that by reason of said State of Texas being a sovereign State no suit or cause of action can be maintained against said State without its consent by the said railroad company, and said company will be without recourse either in law or equity to recover the loss and damage sustained by it by reason of the granting of an

injunction by this court during the pendency of this appeal.

XIX.

Answering further herein defendants say that upon the trial of this cause upon its merits before the said District Court for the Western District of Texas, the State of Texas made the issue that said court should keep the injunction in force preventing the defendant railroad company from dismantling its property during the pendency this appeal.

That said issue was again raised by the State of Texas in its application for an appeal from the order of said court dissolving said injunction and in its assignments of error presented to said District Court, and said court, having before it all the parties and the entire subject matter of this litigation, acting within its sound discretion, refused to continue said injunction in force during the tendency of this appeal.

That said application of the State of Texas shows no facts or circumstances wherein the District Court abused the discretion vested in it by law and the rules of this court, wherefore, these defendants state that the action of said District Court in refusing to continue said injunction in force during the pendency of this appeal is binding and conclusive upon the parties hereto and upon this court.

XX.

The statement made in this answer are from the pleadings and are admitted unless and except in the instances indicated by the wording hereof.

WHEREFORE, defendants pray that said application for an injunction by the State of Texas restraining the said Eastern Texas Railroad Company from taking up, dismantling or removing any or all of its property during the pendency of this appeal be dismissed; but that if this Court grants the injunction as prayed for by the State of Texas that it be required to give bond or other security to protect and indemnify the defendant Railway Company for all loss and damage sustained by it by reason of such injunction and for such other and further orders as they, or either of them, may be entitled to in the premises.

Respectfully submitted,

DANIEL UPTHEGROVE,

E. B. PERKINS,

Solicitors for Defendants.

THE DISTRICT OF }
COLUMBIA } ss.

Daniel Upthegrove, being duly sworn, deposes and says that he is one of the Solicitors for the appellees named in the foregoing answer and is familiar with the facts therein set forth; and affiant further states that the facts stated in the foregoing answer are true as therein stated.

Subscribed and sworn to before me on this the
— day of April 1921.

EXHIBIT A

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 4.

IN THE MATTER OF APPLICATION OF THE EAST- ERN TEXAS RAILROAD COMPANY FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY.

Submitted September 27, 1920.

Decided December 2, 1920.

Certificate of convenience and necessity issued authorizing the Eastern Texas Railroad Company to abandon its line of railway between Lufkin, Tex., and Kennard, Tex.

E. B. Perkins, Daniel Upthegrove, E. J. Mantooth, and E. B. Stroud, Jr., for Eastern Texas Railroad Company.

V. L. Brooks, S. N. Townsend, J. R. Painter, I. D. Fairchild and Clay Stone Briggs, for protestants.

John C. Box, for Lufkin Chamber of Commerce and Angelina County, Tex.

REPORT OF THE COMMISSION.

DIVISION 4, COMMISSIONERS MEYER, DANIELS, EASTMAN and POTTER.

BY DIVISION 4:

The Eastern Texas Railroad Company, hereinafter called the Eastern Texas, by petition filed June 3, 1920,

seeks a certificate of convenience and necessity to permit it to abandon its line of railway in Angelina, Trinity and Houston counties, Texas.

The Eastern Texas extends from Lufkin, Tex., in a westerly direction, 30.3 miles to Kennard, Tex., and has in addition to this main line track about 4 miles of switch, yard, and passing tracks. At Lufkin, its tracks connect with those of the St. Louis Southwestern Railway Company of Texas, hereinafter called the Cotton Belt, the Houston, East & West Texas Railroad, the Groveton, Lufkin & Northern Railway, the Texas Southeastern Railroad, and the Angelina & Neches River Railroad. Applicant has no other railroad connections. It maintains a joint agency with the Cotton Belt at Lufkin, has agency stations at Ratcliff, Tex., and Kennard, and has 6 sidetracks at other points where carload freight may be received or delivered. It owns 1 combination passenger, mail and express car, but no other rolling stock. It rents 1 light locomotive from the Cotton Belt, and pays per diem, under the code rules, for foreign cars while on its line. The only regular service it maintains is 1 mixed freight and passenger train daily, except Sunday, between Lufkin and Kennard.

The Eastern Texas was incorporated November 8, 1900, under the general railroad incorporation laws of Texas, to construct a railroad from Lufkin to Crockett, Tex. Its line was constructed to Kennard in 1901 and 1902, and has been continuously operated since, though it has not been extended to Crockett. The company was promoted and financed by individuals interested in the Texas, Louisiana Lumber Company, hereinafter called the lumber company, which is a subsidiary of the Central Coal & Coke Company of Kansas City, Mo. A substantial amount of applicant's rights of way was donated to it by the owners of the land. It never received a land grant from the state, nor exercised the right of eminent domain. It was originally authorized to issue \$150,000 capital stock, which amount was increased in 1902 to \$1,000,000. Shares of stock with a par value of \$454,500, but no bonds, have been issued. On September 1, 1916, all outstanding stock of the Eastern Texas was acquired by the St. Louis Southwestern Railway Company, hereinafter called the Southwestern, which, except for the directors' qualifying shares, still holds it. There is substantial identity between the officers of the Eastern

Texas and the Southwestern, and the two roads have twice endeavored to consolidate since the stock purchase by the latter. The Texas legislature has refused to authorize the consolidation unless the Eastern Texas would extend its line to Crockett.

Applicant's line was constructed primarily to serve the lumber company which then owned 116,000 acres of pine-timber land near Kennard, and had constructed at Ratcliff what is said to have been one of the largest mills in the south for the production of lumber and forest products. Applicant built numerous tram roads through this timber to connect with its main line. On August 28, 1906, it sold these tram tracks, its current assets and rolling stock, aggregating in book value \$94,604.49, to the lumber company. This sale was made in contemplation of the transfer of the Eastern-Texas stock to the Southwestern for bonds of that company stated to have been worth the par value of the stock and the fair value of the Eastern Texas as determined by the Railroad Commission of Texas.

The Ratcliff mill ceased operation about 1917, and its traf tracks, machinery and practically all of its buildings have since been moved to locations not on applicant's line.

Applicant contends that since the removal of the mill there is not, and within any reasonable time will not be, enough traffic offered to produce revenue sufficient to pay its operating expenses. It shows that the country it serves is largely cutover timber land, and soil poor, and the agricultural development very limited except in the vicinity of Ratcliff and Kennard. It points out that the area is sparsely settled, particularly between those two towns where it is estimated that some 600 people live; and that there are no other towns or villages along the line. Ratcliff is said to have a population of 900 and that of Kennard is estimated at 1200. The timber from some 20,000 acres of land, along applicant's line, owned by the Southern Pine Lumber Company is transported either by the Texas Southeastern Railroad or the Groveton, Lufkin & Northern Railway. Three small mills, installed after the abandonment of the Ratcliff mill on account of the abnormally high prices of lumber and forest products, ceased operating with the decline in the lumber market and were closed at the time of the hearing. The lumber company now owns about 84,000 acres

of land surrounding Ratcliff and Kennard on some of which the second growth of timber is said to be of marketable size, but it is not yet in condition to be profitably cut.

About 70 per cent of the traffic handled by the Eastern Texas in 1916 consisted of forest products. Agricultural products totaled less than 10 per cent, and the remaining 20 per cent was made up of mine products, animals, manufactured products, merchandise and other commodities. During each of the 4 years immediately preceding June 30, 1913, mine products, consisting chiefly of bituminous coal used at the Ratcliff mill, exceeded the products of agriculture and animals combined; but the coal tonnage decreased from 6,886 tons in 1913 to 36 tons in 1918, and no coal moved in 1919, nor during the first 5 months of 1920. The greatest volume of agricultural products moved since 1909 was the 6,592 tons carried in 1914. This traffic had decreased to 2,072 tons in 1919, and 1,038 tons was moved in the first 5 months of 1920. The tonnage of forest products from 1909, to 1917, ranged from 41,312 tons in 1915 to 66,936 tons in 1917. Only 25,738 tons of this traffic moved in 1918, 14,966 tons in 1919, and 9,958 tons in the first 5 months of 1920. The total of all commodities moved has decreased from 78,177 tons in 1913, to 21,352 tons in 1919, and 12,969 tons in the first 5 months of 1920. Exhibits offered showed a detailed statement of the freight tonnage handled by applicant from 1909 to 1920.

The income of the Eastern Texas shows a corresponding shrinkage since 1912 except for the year 1917. Applicant's gross income for the year ended June 30, 1920, was \$31,210 and its net income \$24,494.21. The corresponding figures for 1917 were \$17,336.95 and \$6,391.57. Its operating expenses exceeded its operating revenues by \$9,699.66 in 1918, by \$4,086.15 in 1919, and by \$24,207.10 in the first 5 months of 1920. The total deficit incurred in 1918 was \$20,128.46, in 1919 it was \$19,362.64 and in January and February of 1920 it was \$10,484.27. The Eastern Texas was under Federal control during 1918, 1919, and the first 2 months of 1920, and its net corporate income was \$2,942.36 in 1918 and \$5,041.74 in 1919. There was a deficit of \$2,033.19 for March, 1920, \$4,455.51 for April, 1920, \$11,703.96 for May, 1920, and applicant estimated its total deficit for the year would be \$68,824.68, exclusive of large expendi-

tures necessary for maintenance of way to place the road in safe operating condition. Applicant's general balance sheet shows a credit balance of \$32,393.68 on May 1, 1920.

Applicant states it will furnish bond in the sum of \$100,000 for the cancellation of all of its outstanding obligations, and that the Southwestern will guarantee said bond and advance to applicant sufficient funds to pay or secure the payment of wages, accrued taxes, claims, loans, bills payable and all other lawful obligations outstanding at the date of abandonment, if abandonment is authorized, whether the indebtedness or obligation is or is not audited and reflected in applicant's account, and whether the claim has been or may later be presented.

Rates to and from Lufkin apply to and from Ratcliff and Kennard on interstate traffic, which comprises approximately 75 per cent of applicant's total tonnage. The divisions between the Eastern Texas and the Cotton Belt are said to be on a more liberal basis than is ordinarily allowed individual short-line connections, and applicant contends that it would be impossible to increase its rates or divisions in an amount sufficient to make its revenues meet its operating expenses. Its operating ratio was 440 per cent under the rates in effect immediately prior to the increases authorized in *Increased Rates*, 1920, 58 I. C. C., 220.

The Eastern Texas was originally well laid out from an engineering standpoint, the roadbed being generally level and the grades and curves short. The maximum gradient is slightly more than 1 per cent and the sharpest curve is about 4 degrees. The line was laid with 35 pound steel rails which are not badly worn but are both line and surface bent to such an extent that it is said trains cannot safely be operated over them at a speed exceeding 12 or 15 miles an hour. Many streams run at right angles across the railroad's right of way and, in addition to numerous cuts and fills, there are 50 bridges and trestles with a combined length of 8,862 feet, which range in height from 5 to 25 feet. The roadbed, trestles and bridges have not been well maintained, but the ties are in fair condition. Six bridges and trestles, with a combined length of 2,282 feet, are in need of immediate renewal to insure safe operation and all of the others require heavy repairs. Embankments and fills have fallen away, particularly at bridge and trestle approaches,

to such an extent that the ties are not properly supported. The slopes of cuts and ditches have fallen in, damaging the draining so that, in many places, ties are covered with dirt. Applicant estimates that if operation is continued it will be necessary within the next two years to expend \$146,000 to \$200,000 on roadways, bridges and trestles, due largely to deferred maintenance, attendant on the operation of the line at a loss.

The people of the community served by the Eastern Texas object to the granting of the certificate. It is shown that in case of abandonment of the road the nearest railway stations would be Crockett on the International Great Northern Railway, about 17 miles from Kennard and 20 miles from Ratcliff, and Wells, Tex., on the Cotton Belt, about 20 miles northeast of Ratcliff. The public highways in this territory are not well improved. A fair, graded, clay-and-sand road extends from Ratcliff through Kennard to Crockett, but this road becomes soft during the rainy season. Another road not as good extends from Ratcliff through Sullivan Ferry to Wells. A road from Sullivan Ferry to Lufkin parallels the railroad for approximately 9 miles. Other roads extend from the general territory served by applicant to Morrell, Tex., and Alto, Tex., on the Cotton Belt and to Groveton, Tex., on the Groveton, Lufkin & Northern Railway. Livestock produced in the vicinity of Ratcliff and Kennard hitherto has been driven to Crockett on account of better transportation facilities at that point. If the abandonment is permitted, it will be necessary to dray cotton and forest products a considerable distance to stations, but probably no further than some of the cotton produced in Texas is now hauled. Objectors testified as to the general conditions of the territory and the prospects for further increases in tonnage, but made no definite showing that within any reasonable time, there would be sufficient tonnage to pay the operating expenses of the road. To meet their objections, applicant has offered to sell its line to any local interests for \$50,000.

Upon consideration of the record we find that the present public convenience and necessity permit the abandonment of applicant's line, and we further find that permission to abandon the line should be made subject to the right of persons interested in the community served to purchase the property at a figure not in excess of \$50,000. A certificate and order to that effect will be issued.

Certificate of Public Convenience and Necessity.

At a Session of the Interstate Commerce Commission,
Division 4, Held at Its Office in Washington, D. C., on
the 2d Day of December, A. D., 1920.

Finance Docket No. 4.

In the Matter of Application of THE EASTERN TEXAS
RAILROAD COMPANY for a Certificate of Convenience
and Necessity.

Application No. 1 Ab-1.

Be it known, that on the third day of June, 1920, the Eastern Texas Railroad Company, a carrier subject to the Interstate Commerce Act, filed with the Interstate Commerce Commission its application for a certificate of public convenience and necessity to abandon all of its lines of railway between Lufkin, Tex., and Kennard, Tex., situated in the Counties of Angelina, Trinity and Houston, in the State of Texas, pursuant to the provisions of paragraphs 18, 19, 20 and 21 of Section 1 of the Interstate Commerce Act;

That upon receipt of such application the Commission caused notice thereof to be given to and a copy to be filed with the Governor of the State of Texas and caused said notice to be published for three consecutive weeks in a newspaper of general circulation in each county in or through which said line of railroad is constructed and operates;

That after applicant had made due return to the questionnaire showing the facts and circumstances with respect to such proposed abandonment; and after due notice to all parties in interest, a hearing was held on said application on the 19th day of July, 1920, at Austin, Tex., and on the 26th day of July, 1920, at Ratcliff, Tex., at which all parties in interest were given opportunity to appear and be heard in the premises;

That after said case was submitted, representations were made to the Commission by the Legislature of Texas by a joint resolution with respect to the jurisdiction of this Commission in these proceedings;

That on the 2d day of December, 1920, the Commission, by Division 4, made and filed a report containing its

findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof;

Now, therefore, upon the record in this proceeding,

The Interstate Commerce Commission hereby certifies, that the present public convenience and necessity permit of the abandonment of all of the lines of railroad of the Eastern Texas Railroad Company as follows, to wit:

Between Lufkin, Tex., and Kennard, Tex., through the counties of Angelina, Trinity and Houston, in the State of Texas;

It is therefore ordered, That the Eastern Texas Railroad Company be, and it is hereby authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle or remove any part or all of the property of said company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated.

Provided, however, That the Eastern Texas Railroad Company shall first offer all of the property now owned by it for sale, free of all encumbrances, for a sum not to exceed \$50,000 to any party or parties interested in the community served by said road on condition that the purchaser at such sale shall continue the operation of said lines of railroad;

Provided further, That the Eastern Texas Railroad Company, be, and it is hereby, required to furnish to the Interstate Commerce Commission a good and sufficient bond secured by the St. Louis Southwestern Railway Company in the penal sum of \$100,000, to be approved by the Secretary of the Interstate Commerce Commission, conditioned on the understanding that the said Eastern Texas Railroad Company will, before the expiration of one year after the date of this certificate, adjust, settle and pay all outstanding debts, obligations, judgments, liens, or mortgages, together with all taxes and assessments, Federal, State or municipal, due or to become due, and all claims or judgments for damages to persons or property.

Provided, further, That before suspending operation of said railroad or of any service now being rendered thereon, said Eastern Texas Railroad Company shall give at least thirty days' notice to the public of the date at which such service will be discontinued, said notice to be

posted in a conspicuous manner in each station on said line of railroad; and

Provided, further That the Eastern Texas Railroad Company, when making application for cancellation of tariffs, shall refer to this certificate by title, date and docket number.

By the Commission, Division 4:

[SEAL.]

GEORGE B. MCGINTY,

Secretary.